92-751

Supreme Court, U.S.
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No. 92-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

SNOHOMISH COUNTY; THE SNOHOMISH COUNTY COUNCIL; and the SNOHOMISH COUNTY HEARING EXAMINER,
Petitioners,

v.

LUTHERAN DAY CARE, A NON-PROFIT CORPORATION,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Where a municipality's denial of a land use permit has been found to be arbitrary and capricious, does that finding automatically establish that the municipality is liable for damages under 42 U.S.C. § 1983 for a violation of the "substantive due process" rights of the landowner?

(2) Is such a municipality liable for damages under 42 U.S.C. § 1983 regardless of whether the landowner had a legitimate claim of entitlement to, or any other property interest in, the permit in question?

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of the State of Washington in this case.[1]

OPINIONS BELOW

The decision of the Washington Supreme Court is reported at 119 Wash. 2d 91, 829 P.2d 746 (1992), and is reproduced in the Appendix ("App.") at 1a-

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[1] Pursuant to Rule 29.1 of the Rules of this Court, petitioners state that the County of Snohomish is a municipality and, as such, has no parent companies or subsidiaries.

37a. The order of certification of the Court of Appeals of the State of Washington, Division I, certifying the case to the Washington Supreme Court is unreported and is reproduced at App. 38a. The decisions of the Superior Court for Snohomish County, Washington, are unreported and are reproduced at App. 41a to 51a.

JURISDICTION

The decision of the Washington Supreme Court was entered on May 14, 1992. Petitioners' motion for reconsideration was denied on July 30, 1992. The petition is therefore due on October 28, 1992. This court has jurisdiction under 28 U.S.C. § 1257(a) (1988).

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall . . . deprive any person of life, liberty or property, without due process of law. . . .

42 U.S.C. § 1983 (1988) provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State . . . subjects, or causes to be subjected, any . . . person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured. . . .

42 U.S.C. § 1988 (1988) provides in pertinent part:

> In any action or proceeding to enforce a provision of [42 U.S.C. §§ 1981, 1982, 1983,

> 1985, and 1986], title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or Title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Washington Revised Code Sections 7.16.010-7.16.140, 36.70.020(7), 36.70.810, 36.70.820, 36.70.870, 36.70.970, and Chapters 42.36 and 64.40 (1989) are reproduced at App. 231a-241a. The Snohomish County Home Rule Charter, Article 2 (1987), is reproduced at App. 242a-247a. Snohomish County Code ("SCC") Sections 2.02.010, 2.02.020, 2.02.060, 2.02.100, 2.02.180, 2.02.190 (1990); and former Sections 18.08.190, 18.08.540, 18.18.010, 18.18.030, 18.20.010, 18.20.030, 18.88.060, and 18.88.070 (repealed 1989); are reproduced at App. 248a-254a.

STATEMENT

This is a Section 1983 case arising from the denial, by petitioner Snohomish County, of a "conditional use permit" sought by respondent landowner. In a prior decision, the Superior Court of Snohomish County had reversed that denial as "arbitrary and capricious" and ordered petitioners to grant the permit, which they did. In the decision from which review is sought, the Washington Supreme Court reversed a dismissal of damage claims and ordered summary judgment for respondent on the issue of the liability of petitioner County, under both 42 U.S.C. § 1983 and a state

statute, for damages for the temporary denial of the permit. The Washington Supreme Court held that the prior superior court ruling conclusively established that the County had deprived respondent of substantive due process rights guaranteed by the Fourteenth Amendment.[2]

Background

Under Washington zoning law, a "conditional use" of property is "a use listed among those classified in any given zone but permitted to locate only after review by . . . [a specified body—in the case of Snohomish County, a hearing examiner—after a public hearing] and the granting of a conditional use permit imposing such performance standards as will make the use compatible with other permitted uses in the same vicinity and zone. . . ."[3] In particular, in Snohomish County, in an area zoned RR 9600 (single family rural-residential with minimum lot area of 9,600 square feet) "hospitals, sanitariums and rest homes" may be permitted as a conditional use under SCC §§ 18.18.030 and 18.20.030. (App. 252a-253a).

On February 8, 1984, respondent Lutheran Day Care filed an application for a conditional use permit to construct a "rest home" on property zoned RR

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[2] Also named as defendants and appearing as petitioners in this Court are the Snohomish County Council and the Snohomish County Hearing Examiner. However, the county council members and the hearing examiner "have been named defendants only in their official capacities as representatives of the County," and only the County's liability is at issue. (App. 4a).

[3] Wash. Rev. Code § 36.70.020(7) (App. 234a); SCC § 18.08.190 (App. 251a); *see* Wash. Rev. Code §§ 36.70.810, .820, .870, .970 & ch. 42.36. (App. 234a-239a); SCC §§ 2.02.010, .020, .060, .100, .180, .190, 18.88.060 & 18.88.070 (App 248a-254a).

9600. (App. 199a). An amended application, seeking permission to erect a 77-dwelling unit structure, was denied by the Snohomish County Hearing Examiner on November 24, 1986. (App K).[4] The hearing examiner explained that a conditional use is permissible only if it can be made compatible with the uses allowed outright in the zone; he found that respondent's proposal could not be made compatible because of problems of traffic circulation, the bulk of the proposed structure, and the proposed density of usage of the property. (App. 111a-113a). Respondent appealed the hearing examiner's decision to the county council of Snohomish County, which on December 24, 1986 adopted the hearing examiner's findings and conclusions and affirmed his decision. (App. 94a); *see* SCC § 2.02.180 (App. 249a-251a).

Respondent then filed the present action in Snohomish County Superior Court. As subsequently amended, its complaint sought among other things (i) a state-statutory writ of certiorari under Wash. Rev. Code §§ 7.16.030-.140 (App. 231a-233a), to review the denial of the permit, and (ii) damages for the allegedly wrongful denial of the permit under (a) Wash. Rev.

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[4] Earlier, on February 22, 1985, the hearing examiner had returned the application to respondent for procedural defects. (App. 203a-229a). Respondent then submitted an amended application, which the hearing examiner denied after notice and hearing on July 3, 1985, on the ground that the proposed structure did not qualify as a "rest home" within the meaning of the ordinance. (App. 201a). This decision was affirmed by the Snohomish County Council (App. 164a) but reversed by the superior court, which held that the decision was "erroneous as a matter of law" and sent the matter back for a new hearing on the merits. (App. 158a-160a). That hearing was held on November 4, 1986 (App. 100a) and led to the hearing examiner's November 24, 1986 denial of the application on the merits. (App. 97a-115a).

Code § 64.40.020(1) (App. 239a-241a), (b) the state's common law of tortious interference, and (c) 42 U.S.C. § 1983. (App. 2a).

Respondent's demand for an order to review the denial of the permit was heard separately, before the court took up respondent's claims for damages. (The certiorari procedure is used only to correct improper judicial or quasi-judicial decisions; review is limited to the record before the judicial or quasi-judicial body; the only issue is whether its decision was correct, and "[c]onsiderations of culpability should not enter into the decision." (App. 21a-22a). On February 9, 1989 the superior court ruled that the county council's decision denying the permit had been arbitrary and capricious, finding that

> the internal circulation system, the bulk and dimensional elements of the project, the site plan, and the density of development, as proposed by [respondent], are reasonable and acceptable based upon the evidence in the record and upon the ascertainable standards of Snohomish County.

(App. 54a-55a). The court made no finding of any improper or invidious motive or irregular procedure. It remanded the matter for the issuance of a conditional use permit for the rest home on such technical preconditions as the hearing examiner might deem appropriate. (App. 55a). Five weeks later on March 15, 1989, the hearing examiner granted the conditional use permit subject to specified preconditions; respondent did not challenge that order, and its permit became effective on October 16, 1989. (App. 135a-140a).

On November 22, 1989, a different superior court judge dismissed respondent's damage claims with

prejudice. (App. 44a-45a). The court held that recovery under the state statute and state tort law was barred because, inter alia, the denial of the conditional use permit was a quasi-judicial act for which the county was immune from liability under state law. It rejected respondent's claim under 42 U.S.C. § 1983 on the ground that "[respondent] has not shown that the denial [of the permit] was made with purposeful discrimination or at least an allegation that the misdeeds were knowing or reckless." (App. 51a).

Proceedings in the Washington Supreme Court

Respondent appealed the dismissal of its damage claims to the state court of appeals, which certified the case to the Washington Supreme Court. That court accepted direct review and, on May 14, 1992, reversed and granted summary judgment to respondent on the issues of liability under Wash. Rev. Code § 64.40.020(1) and 42 U.S.C. § 1983.[5] The court also held that respondent is entitled to recover attorneys' fees under either Wash. Rev. Code § 64.40.020(2) or 42 U.S.C. § 1988, and remanded to the trial court to determine an appropriate award.

With respect to the state statutory damage claim, the Washington Supreme Court assumed that the county council and hearing examiner had been engaged in quasi-judicial acts, but it held that Wash. Rev. Code § 64.40.020 had eliminated, for cases covered by that section, a municipality's immunity from liability for quasi-judicial acts of its officials. (App. 6a

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[5] The court affirmed the dismissal of respondent's claim of tortious interference with its business expectancy on the ground that the county council's decision enjoyed immunity as a quasi-judicial action. (App. 35a).

and 18a). The court then ruled that the state certiorari proceeding had conclusively established that the County's decision to deny the conditional use permit had been arbitrary and capricious and that no additional finding of fault was necessary to establish liability under Wash. Rev. Code § 64.40.020(1). (App. 22a-23a).

With respect to the federal damage claims that are the subject of this petition, petitioners argued, inter alia, that respondent did not have a property right to the issuance of a conditional use permit and that there was in any event no denial of substantive due process. The Washington Supreme Court gave short shrift to the question whether respondent had a property right, saying only:

> Along with the vast majority of federal courts, we recognize that denial of a building permit, under certain circumstances, may give rise to a substantive due process claim. . . . We see no reason to treat denial of a conditional use permit any differently. Such denial therefore can constitute a due process violation.

(App. 32a-33a (quotation marks and citation omitted)). The court ignored the fact that, under the statute, issuance of a conditional use permit is inherently a discretionary decision that depends on an assessment, after a public hearing, of compatibility with the prevailing background use. *See* p. 4, *supra*.

The court then held that there is a violation of Fourteenth Amendment substantive due process whenever a land use decision is "arbitrary or capricious," and that the superior court had therefore erred in rejecting respondent's claim on the ground that

"the County did not act knowingly or recklessly in denying the permit." (App. 33a). It said that the

> finding in the certiorari action that the County acted arbitrarily and capriciously in denying the permit conclusively satisfies [the Fourteenth Amendment] standard. [Respondent] therefore has established as a matter of law and fact that the County violated substantive due process when it denied the conditional use permit.[6]

(App. 33a).

REASONS FOR GRANTING THE PETITION

A. The Washington Supreme Court's Ruling That Any Land Use Decision That Is "Arbitrary and Capricious" Necessarily Denies Substantive Due Process in Violation of the Fourteenth Amendment Conflicts With Decisions of This Court, Another State Court of Last Resort, and Several United States Courts of Appeals.

In *Robinson v. Seattle*, 119 Wash. 2d 34, 830 P.2d 318 (1992), *petition for cert. filed*, 61 U.S.L.W. 3266 (U.S. Sept. 15, 1992) (No. 92-487) and *Sintra, Inc. v. Seattle*, 119 Wash. 2d 1, 829 P.2d 765 (1992), *petition for cert. filed*, 61 U.S.L.W. 3266 (U.S. Sept. 15, 1992) (No. 92-487), the Washington Supreme Court expanded the concept of Fourteenth Amendment sub-

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[6] The Washington court ordered summary judgment of liability under both the state statute and 42 U.S.C. § 1983. Its interpretation of the state statute, while conclusive, is not a state ground precluding review of its interpretation of the federal statute. The Washington court treated the claims as separate, analyzed them independently, and sustained each of them. It did not examine the extent to which the damages and attorneys' fees awardable under the two provisions might overlap.

stantive due process as applied to land use regulation, and therefore the punishing reach of 42 U.S.C. § 1983 as applied to municipalities and their officials engaged in such regulation, well beyond the boundaries set by this Court and the federal courts of appeals. In the present case, in a decision rendered the same day as *Robinson* and *Sintra*, the Washington court engaged in a similar, inappropriate expansion: it held that whenever a denial of a land use permit has been reversed under state law as arbitrary and capricious, there has necessarily been a denial of substantive due process for which the landowner can recover damages under Section 1983.

The state court said quite explicitly that any arbitrariness sufficient to invalidate a permit denial is automatically sufficient to establish a violation of the Fourteenth Amendment and a federal right to damages:

> Such a violation is made out . . . if the decision to deny the permit is . . . "arbitrary or capricious". In the present case, the trial court can be interpreted as denying [respondent's] due process claim based on the fact that the County did not act knowingly or recklessly in denying the permit. This is the wrong standard. The standard is arbitrary or capricious and as already discussed, Judge Kershner's *finding in the certiorari action that the County acted arbitrarily and capriciously in denying the permit conclusively satisfies that standard.* Appellant therefore has established as a matter of law and fact that the County violated substantive

> due process when it denied the conditional use permit.

(App. 33a (emphasis added; citation omitted)). The court gave the earlier ruling this conclusive effect for purposes of the federal damage claim despite its clear recognition that the certiorari proceeding had not been concerned with any question of culpability:

> The certiorari procedure is used to correct improper judicial or quasi-judicial decisions. As such, the judge who is considering whether to grant relief under the writ is considering *only* whether the decision made below was correct. Considerations of culpability should not enter into the decision.

(App. 21a-22a (emphasis in original; citation omitted)).

The state court's holding that a state trial court's invalidation of a permit denial on grounds of "arbitrariness" automatically establishes liability under Section 1983 is quite wrong. This Court has recently reiterated, albeit in a different context, that the Due Process Clause of the Fourteenth Amendment does not reach, and Section 1983 does not remedy, the ordinary mistakes of state and local officials, even if they affect life, liberty or property. In *Collins v. Harker Heights*, 112 S.Ct. 1061 (1992), the Court rejected a Section 1983 claim alleging that a municipality had denied an employee substantive due process because it failed to protect him against a known workplace hazard that led to his death. The Court said that, "[a]s a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decision-making in this uncharted area are scarce and open-

ended." *Id.* at 1068. It added that " '[h]istorically, this guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty or property.' " *Id.* at 1069 n.10 (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)). The Court noted that there was no allegation of "a wilful violation of Collins' rights," *id.* at 1068-69, and held that, while the failure to warn might be tortious, it could not "properly be characterized *as arbitrary, or conscience-shocking, in a constitutional sense.*" *Id.* at 1070 (emphasis added).[7]

In the land use permit context, the distinction between arbitrariness amounting to error and the kind of deliberate or egregious misconduct that constitutes a deprivation of constitutional rights has been sharply drawn in recent years by a state court of last resort and several federal courts of appeals. *E.g.*, *Northpointe Plaza v. Rochester*, 465 N.W.2d 686, 691 (Minn. 1991) (no § 1983 claim based on denial of a conditional use permit where a city's actions, although "at best, arbitrary," nevertheless "did not rise to the level of 'egregious' and 'irrational' conduct"); *Chiplin Enter., Inc. v. Lebanon*, 712 F.2d 1524, 1528 (1st Cir. 1983) (even bad faith refusal to issue a building permit in violation of state law did not violate substantive due process so as to give rise to § 1983 claim, when state remedies were available); *Brady v. Colchester*, 863 F.2d 205, 216 (2d Cir. 1988) (Section 1983 claim is stated only where permit is denied because of indefensible reasons such as "political animus"); *Midnight*

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[7] The Court quoted *Bishop v. Wood*, 426 U.S. 341, 350 (1976): "The Due Process Clause 'is not a guarantee against incorrect or ill-advised personnel decisions'." *Collins*, 112 S.Ct. at 1070. *See Daniels v. Williams*, 474 U.S. 327, 332 (1986).

Sessions, Ltd. v. Philadelphia, 945 F.2d 667, 683 (3d Cir. 1991), *cert. denied*, 112 S.Ct. 1668 (1992) (no due process violation unless applications denied for political, racial, or similar improper reasons); *Coniston Corp. v. Hoffman Estates*, 844 F.2d 461, 467-468 (7th Cir. 1988) ("the fact that town officials are motivated by parochial views of local interests which work against plaintiffs' plan and which may contravene state subdivision laws (or, we add, local ordinances) does not state a claim or denial of substantive due process") (quotation marks and citation omitted); *Condor Corp. v. St. Paul*, 912 F.2d 215, 280 (8th Cir. 1990) (denial of permit for a heliport held "arbitrary" but no substantive due process claim because denial not "egregious" or "irrational" such that the action exceeds standards of inadvertence or mere errors of law); *Sierra Lake Reserve v. Rocklin*, 938 F.2d 951, 957-58 (9th Cir. 1991) (to establish violation of substantive due process, plaintiffs "must show that municipality's action was clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare") (quotation marks and citation omitted); *MacKenzie v. Rockledge*, 920 F.2d 1554, 1558 (11th Cir. 1991) (plaintiff must show "improper motive"); *Silverman v. Barry*, 845 F.2d 1072, 1080 (D.C.Cir.), *cert. denied*, 488 U.S. 956 (1988) ("[o]nly a substantial perversion of state law prompted by personal or group animus, or deliberate flouting of the law that trammels significant personal or property rights, qualifies for relief under § 1983").[8]

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[8] The D.C. Circuit drew the same distinction in a different context:

> [The doctrine of substantive due process] does not

In the present case, the superior court, hearing the state-certiorari challenge to the denial of respondent's application, had no jurisdiction to consider whether petitioners had engaged in "culpable" conduct, *see* p. 6, *supra*, and certainly did not make any finding on which a conclusive determination of Section 1983 liability could be based under the tests set forth in the cases cited above. While petitioners' denial of a conditional use permit was held to have been unjustified, the ruling, to which the Washington Supreme Court gave conclusive effect for purposes of a federal law damage award, said nothing at all about an improper or suspect motive and made no finding that there had been any conduct that was "arbitrary, or

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> protect individuals from all [governmental] actions that infringe liberty or injure property in violation of some law. Rather, substantive due process prevents 'governmental power from being used for purposes of oppression,' or 'abuse of government power that shocks the conscience,' or 'action that is legally irrational in that it is not sufficiently keyed to any legitimate state interests.'

Committee of U.S. Citizens in Nicaragua v. Reagan, 859 F.2d 929, 943 (D.C. Cir. 1988) (citations omitted).

Other cases include *Creative Environments, Inc. v. Estabrook*, 680 F.2d 822, 833 (1st Cir.), *cert. denied*, 459 U.S. 989 (1982); *Pace Resources, Inc. v. Shrewsbury*, 808 F.2d 1023 (3rd Cir.), *cert. denied*, 482 U.S. 906 (1987); *Crocker v. Hakes*, 616 F.2d 237, 239 n.2 (5th Cir. 1980); *New Burnham Prairie Homes, Inc. v. Burnham*, 910 F.2d 1474, 1481 (7th Cir. 1990); *Lemke v. Cass County*, 846 F.2d 469, 472 (8th Cir. 1987) (Arnold, J., concurring); *Dean Tarry Corp. v. Friedlander*, 650 F. Supp. 1544 (S.D.N.Y. 1987), *aff'd*, 826 F./2d 210 (2d Cir. (1987); *see generally Pearson v. Grand Blanc*, 961 F.2d 1211, 1220-23 (6th Cir. 1992) (cataloguing cases).

conscience-shocking, in a constitutional sense." *See Collins,* 112 S.Ct. at 1070.[9]

If the Washington Supreme Court were right, virtually any erroneous exercise of local governmental discretion to deny a permit of any sort to a landowner would entitle the landowner not only to reversal of the decision but also to damages under federal law. The result would be to federalize what ought to be state procedures for correcting state errors and to threaten local decisionmakers with federal law damages for judgments they should be able to make without fear. That threat ought to be reserved for local action that is "egregiously unacceptable, outrageous, or conscience shocking." *Amsten v. Moran,* 904 F.2d 748, 754 (1st Cir. 1990), *cert. denied,* 111 S.Ct. 713 (1991).

B. The Washington Court Failed To Consider Whether Respondent Had Any Property Interest—Any "Legitimate Claim of Entitlement"—to a Conditional Use Permit of Which It Was Deprived.

A Section 1983 claim based on the Fourteenth Amendment lies only if the plaintiff has been deprived of "life, liberty or property." Here, the Washington Supreme Court apparently assumed that respondent had a property interest in—*i.e.*, a legitimate claim of

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[9] Neither the superior court nor the Washington Supreme Court suggested that the term "arbitrary and capricious," as used by the superior court, meant "invidious" or "discriminatory" or "conscience-shocking," rather than having its common meaning that the decision was not justified in light of the record. "Arbitrary and capricious" is the standard of review prescribed by the Washington Revised Code for a wide variety of decisions. *E.g.*, Wash. Rev. Code § 41.64.130 (state personnel decisions); § 67.04.130 (invalidation of contracts signed by minors).

entitlement to—the issuance of a conditional use permit. Although petitioners challenged this point, the Washington court attempted no analysis except to state that it saw no reason to treat the denial of the conditional use permit any differently than the denial of a building permit. (App. 32a). The court erred in refusing to analyze whether respondent had been denied any protected property interest.

The very case that the Washington court relied on for the proposition that a landowner has a property interest in an application for a building permit demonstrates that not all permit applications will support substantive due process claims. In *Bateson v. Geisse*, 857 F.2d 1300 (9th Cir. 1988), the court first noted that where a substantive due process claim is based on the allegedly wrongful denial of a permit, an essential element of that claim is a protectable property interest, as of the time of the alleged denial, in the issuance of the permit. 857 F.2d at 1305. The court then held that while the plaintiff *did* have a protectable property interest in a building permit, he did *not* have any protectable property interest in approval of his application for a "minor plat," *id.* at 1305, because the approval of a minor plat was discretionary and he therefore did not have a "legitimate claim of entitlement" within the meaning of *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).[10]

The analytical framework for such cases has been outlined by the Second Circuit:

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[10] Similarly, in *Lemke v. Cass County*, 846 F.2d 469, 470-71 (8th Cir. 1987), the court said, "Whether a substantive due process claim may arise from a denial of a zoning permit is an open question in this circuit. . . ."

> The analytical framework applicable to constitutional challenges to land regulation was affected by the Supreme Court's 1972 decisions in *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972), and *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972). Though concerned with an interest in employment, rather than land, and the protection of procedural, rather than substantive, due process, both decisions were potentially pertinent to land regulation in their announcement that a property interest, within the meaning of the Fourteenth Amendment, includes not only what is owned but also, in some limited circumstances, what is sought. This expanded concept of property, however, *requires more than "an abstract need or desire" or "a unilateral expectation" of what is sought. Board of Regents v. Roth, supra*, 408 U.S. at 577, 92 S.Ct. at 2709. *Instead, there must be "a legitimate claim of entitlement." Id.; see Perry v. Sindermann, supra*, 408 U.S. at 601.

R.R.I. Realty Corp., Inc. v. Southampton, 870 F.2d 911, 915 (2d Cir.), *cert. denied*, 493 U.S. 893 (1989) (emphasis added).

In *Bateson*, the distinction between the building permit and the minor plat, both of which plaintiff sought, was that issuance of the former was mandatory while approval of the latter was discretionary. On the one hand,

> [t]he City of Billings' regulations provide that once an applicant's building plans comply

> with the code and other applicable laws and the fees are paid, the building official *must* issue a building permit to the applicant. . . . These regulations do not provide for review by the City Council before a building permit can issue.

857 F.2d at 1303 (emphasis in original). On the other hand, Bateson did *not* have a legitimate claim of entitlement to approval of a minor plat because he "failed to show that state or local law created an entitlement to approval of the proposed minor plat. The applicable municipal ordinance . . . specifically authorizes the City Council to approve, conditionally approve or reject a minor plat." *Id.* at 1305 (emphasis added).

Petitioners argued that under Washington law and Snohomish County ordinances respondent could not have a protected property interest in the issuance of a conditional use permit at any time before the superior court's order on state certiorari. The basis for this argument was that the law requires an applicant to submit to a process in which the decisionmaker (here, the county council) has the explicit power and obligation to impose preconditions it finds necessary that will "make the [proposed] use compatible with other permitted uses in the same vicinity and zone." *See* p. 4, *supra*. The Washington Planning Enabling Act for Counties, Wash. Rev. Code ch. 36.70, establishes the standard for granting conditional use permits:

> "Conditional use" means a use listed among those classified in any given zone but permitted to locate only after review by the

> board of adjustment, or zoning adjuster if there be such, and the granting of a conditional use permit imposing such performance standards as will make the use compatible with other permitted uses in the same vicinity and zone and assure against imposing excessive demands upon public utilities, provided the county ordinances specify the standards and criteria that shall be applied.

Wash. Rev. Code § 36.70.020(7). (App. 233a-234a). The statute recognizes that some uses may or may not be compatible with a particular zone "depending upon where they are located and how they are actually developed." R. Settle, *Washington Land Use and Environmental Law and Practice*, § 2.10, at 52 (1983).

The range of discretion inherent in this process is shown in the Snohomish County Code provisions setting forth the factors that the hearing examiner is to consider in deciding whether to grant the conditional use permit. SCC § 18.88.060. (App. 253a-254a). These provisions suggest on their face that the process is highly discretionary and that the land owner has no "legitimate claim of entitlement" until the process is completed and the conditions on which the permit will be issued have been specified.

We recognize, of course, that the Washington Supreme Court is the highest authority on the meaning of the pertinent state statutes and county ordinances, and that its interpretations of these provisions could substantially affect whether respondent had any "property" interest within the meaning of the Fourteenth Amendment. But possessing this authority is not the same as exercising it. The court wholly failed

to conduct the analysis necessary to determine whether respondent could have been deprived of "property" by petitioners' actions. It was error to award respondent summary judgment of liability on a claim under the Fourteenth Amendment without analyzing one of the essential elements of that claim.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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92-751

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No. 92-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

SNOHOMISH COUNTY; THE SNOHOMISH COUNTY COUNCIL; and the SNOHOMISH COUNTY HEARING EXAMINER,
Petitioners,

v.

LUTHERAN DAY CARE, A NON-PROFIT CORPORATION,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

THE SUPREME COURT OF WASHINGTON

LUTHERAN DAY CARE,

Appellant,

v.

SNOHOMISH COUNTY, ET AL,

Respondents.

[No. 57610-6. En Banc. May 14, 1992.]

OPINION

BRACHTENBACH, J.—This land use case involves the following issues:

1. Does RCW 64.40.020 abolish municipal quasi-judicial immunity for certain land use decisions as described in that statute? Yes.

2. Does the doctrine of collateral estoppel apply against the County in this damages action wherein the trial court in a prior hearing held the County's actions to be arbitrary and capricious? Yes.

3. Does plaintiff have a cause of action under 42 U.S.C. § 1983? Yes.

4. Does plaintiff have a state tort action for intentional interference with a business expectancy? No.

5. Is plaintiff entitled to attorney fees under RCW 64.40.020(2) and 42 U.S.C. § 1988? Yes.

This action for damages arises from the protracted efforts of a property owner, Lutheran Day Care (appellant), to obtain a conditional use permit to build a "rest home" on its property. After denial of its first application by the hearing examiner, appellant submitted a second applica-

tion. After denial of the second application by the hearing examiner, affirmed by the Snohomish County Council, the Snohomish County Superior Court held the denial was erroneous as a matter of law. On appeal, Division One of the Court of Appeals affirmed. *Lutheran Day-Care v. Snohomish Cy.*, noted at 50 Wn. App. 1058 (1988).

Yet another application was then denied by the hearing examiner and, again, the hearing examiner's decision was affirmed by the county council. Appellant then filed a complaint in the Superior Court, naming Snohomish County (County), the Snohomish County Council (county council), and the Snohomish County Hearing Examiner (hearing examiner) as defendants. This complaint stated two causes of action, one requesting the court to issue a writ of certiorari and order requiring that the permit be issued, and the other requesting damages, under RCW 64.40, as a remedy for the arbitrary and capricious conduct of the hearing examiner and the county council members. The complaint was later amended to include a third cause of action for tortious interference with a business expectancy and a fourth cause of action for violation of civil rights under 42 U.S.C. § 1983.

Judge Thibodeau of the Snohomish County Superior Court issued a writ of certiorari to review the most recent decision not to grant the permit. Judge Kershner heard the case (the second superior court hearing to this point) and held that there was no factual basis for the hearing examiner's conclusions, nor was "there reference to standards, if any, that support the Examiner's decision." Order on Writ of Certiorari, Clerk's Papers of Plaintiff, at 303. The Superior Court therefore remanded the matter to the hearing examiner for detailed findings of fact and identification of the standards being applied. The hearing examiner, without further hearing, filed supplemental findings of fact and conclusions in support of denial.

Upon review of this action, Judge Kershner held

> [the] findings and conclusions by the Hearing Examiner constitute wilful and unreasonable action without consideration and in disregard of the relevant facts and circumstances. The denial of the Conditional Use Permit on these grounds is arbitrary, capricious and unlawful.

Clerk's Papers of Plaintiff, at 304. He therefore ordered the immediate issuance of the permit. The County did not appeal this holding and the permit was issued.

Thus, the Superior Court has held relative to the denial of appellant's conditional use permit: (1) that the second denial was erroneous as a matter of law (affirmed by the Court of Appeals), (2) that the third decision of the hearing examiner was without factual basis and without identifiable standards, and (3) that the findings and conclusions ultimately made constituted willful and unreasonable action and thus were arbitrary, capricious and unlawful.

Following Judge Kershner's decision in the certiorari proceeding, defendants moved for summary judgment dismissal of appellant's three remaining causes of action for damages. Appellant also moved for summary judgment, seeking to establish defendants' liability under the second and fourth causes of action (RCW 64.40; 42 U.S.C. § 1983). Judge Thibodeau granted summary judgment for defendants on all three causes of action. The court held that appellant's causes of action under RCW 64.40 and for tortious interference must fail because the actions of the hearing examiner and county council in denying the conditional use permit were quasi-judicial and therefore protected by quasi-judicial immunity. Even if they were not, the court concluded, appellant failed to meet the statutory requirements of RCW 64.40. Further, the court held that, as to the § 1983 claim, appellant "has not shown that the denial [of the permit] was made with 'purposeful discrimination or at least an allegation that the misdeeds

were knowing or reckless.' " Clerk's Papers of Plaintiff, at 16.

We accepted certification of the appeal (RCW 2.06.030(d)) and now reverse.

I
RCW 64.40.020

This is an "official capacity" lawsuit. In other words, appellant is suing only the County; the hearing examiner and individual county council members have been named defendants only in their official capacities as representatives of the County. This aspect of the case is important because appellant relies on RCW 64.40.020 for its recovery and that statute only creates liability for an "agency" such as the County. RCW 64.40.020(1), .010(1). The statute does not purport to address the liability of individual governmental officials and we, therefore, do not address any question of the individual officials' liability.

RCW 64.40.020 provides:

> (1) Owners of a property interest who have filed an application for a permit have an action for damages to obtain relief from acts of an agency which are arbitrary, capricious, unlawful, or exceed lawful authority. . . *Provided*, That the action is unlawful or in excess of lawful authority only if the final decision of the agency was made with knowledge of its unlawfulness or that it was in excess of lawful authority, or it should reasonably have been known to have been unlawful or in excess of lawful authority.
>
> (2) The prevailing party in an action brought pursuant to this chapter may be entitled to reasonable costs and attorney's fees.
>
> (3) No cause of action is created for relief from unintentional procedural or ministerial errors of an agency.

> (4) Invalidation of any regulation in effect prior to the date an application for a permit is filed with the agency shall not constitute a cause of action under this chapter.

Appellant alleges that the hearing examiner and the county council acted in an "arbitrary, capricious, [and] unlawful" manner when they denied appellant its conditional use permit and that therefore the County, as the relevant "agency", is clearly liable under RCW 64.40.020(1). The trial court, however, concluded that the county council and the hearing examiner were protected by quasi-judicial immunity. It concluded that RCW 64.40.020 did not evidence sufficient legislative intent to change the common law rule of immunity and therefore ruled that the County could not be liable under the statute.

Quasi-judicial immunity attaches to persons or entities who perform functions that are so comparable to those performed by judges that it is felt they should share the judge's absolute immunity while carrying out those functions. *See Butz v. Economou*, 438 U.S. 478, 512-14, 57 L. Ed. 2d 895, 98 S. Ct. 2894 (1978). Thus, quasi-judicial immunity is absolute. *Babcock v. State*, 116 Wn.2d 596, 606-08, 809 P.2d 143 (1991). It should be made clear, however, that such immunity is not to be confused with absolute *judicial* immunity. The phrase "quasi-judicial" employs the word "judicial" only in comparing the *function* of a nonjudicial person or entity to the functions of a judge. True judicial immunity of judges and of those to whom courts have accorded extended judicial immunity are not here involved.

The trial court relied for its conclusion that quasi-judicial immunity applies in this case on a number of Court of Appeals opinions and a footnote in one opinion of this court which seem to indicate that absolute quasi-judicial immunity is available. *See Pleas v. Seattle*, 112 Wn.2d 794, 805 n.1, 774 P.2d 1158 (1989); *Layne v. Hyde*, 54 Wn.

App. 125, 773 P.2d 83, *review denied*, 113 Wn.2d 1016 (1989); *Grader v. Lynnwood*, 53 Wn. App. 431, 442, 767 P.2d 952, *review denied*, 113 Wn.2d 1001, *cert. denied*, 493 U.S. 894, 107 L. Ed. 2d 193, 110 S. Ct. 243, *reh'g denied*, 493 U.S. 986 (1989); *Jensen v. Torr*, 44 Wn. App. 207, 213, 721 P.2d 992, *review denied*, 107 Wn.2d 1004 (1986); *Rayburn v. Seattle*, 42 Wn. App. 163, 709 P.2d 399 (1985), *review denied*, 105 Wn.2d 1007 (1986).

We note that these cases, where they contain any analysis of the issue at all, have generally based their holdings on conclusory citation of authority and not on the detailed policy-oriented factual inquiry which we will later show is necessary to decide the immunity question. "When a governmental action is characterized as 'legislative' or 'adjudicative,' there is the risk that the characterization will be carried beyond the specific issue being decided." *Strawberry Hill 4 Wheelers v. Board of Comm'rs*, 287 Or. 591, 602, 601 P.2d 769 (1979). Thus, strict reliance on case law to determine the extent of immunity carries the risk of finding immunity based on the fact that the function being performed has been characterized as "quasi-judicial" in a prior case which may have concerned entirely different issues and in which the court did not have reason to consider the policy implications of absolute immunity. Such reliance also carries with it the risk of finding immunity based on analogy to a case where the title held by the relevant official is the same as the one at issue, but the functions, procedures, and inherent protections available are quite different.

However, since both parties have assumed that absolute quasi-judicial immunity would apply in the absence of RCW 64.40.020, we do not decide the issue of whether it should. Decision of that issue must await adequate briefing. We therefore assume that absolute quasi-judicial immunity does protect the hearing examiner and county council members and we base our analysis of the statute on that assumption.

Under *Creelman v. Svenning*, 67 Wn.2d 882, 885, 410 P.2d 606 (1966), a city, county, or state which employs an officer also enjoys the quasi-judicial immunity of that officer for the acts of that officer. *Cf. Guffey v. State*, 103 Wn.2d 144, 153, 690 P.2d 1163 (1984) (municipality enjoys the qualified immunity of its police officers). *But cf, Babcock v. State, supra* at 619-22 (State does not enjoy the immunity of its Department of Social and Health Services caseworkers). Contrary to the trial court's analysis, the issue in this case is not whether RCW 64.40.020 was intended to change the rule of individual officer immunity, but whether it was intended to change the *Creelman* rule of imputed municipal immunity. This is because, as explained earlier, RCW 64.40.020 only creates a cause of action against an "agency". Agency is defined in RCW 64.40.010(1) as "the state of Washington, any of its political subdivisions, including any city, town, or county, and any other public body exercising regulatory authority or control over the use of real property in the state." The statute therefore *does not* create a cause of action against individual members of an agency, but only against the agency itself. Appellant has implicitly accepted this fact by noting that this suit is against the County, not against the hearing examiner or county council members in their individual capacities. Brief of Appellant, at 2-3.

The County nevertheless argues that RCW 64.40.020 cannot be interpreted to change the rule of absolute quasi-judicial immunity unless it does so explicitly, since statutes in derogation of common law are to be strictly construed. *Green Mt. Sch. Dist. 103 v. Durkee*, 56 Wn.2d 154, 160-61, 351 P.2d 525 (1960); *Glass v. Stahl Specialty Co.*, 97 Wn.2d 880, 887-88, 652 P.2d 948 (1982). According to the County, since RCW 64.40.020 contains no express abrogation of quasi-judicial immunity, the immunity must still be in place.

While we have in the past relied on the rule that statutes in derogation of the common law must be strictly

construed, *see, e.g., Green Mt. Sch. Dist. 103 v. Durkee, supra*, that rule has come under an increasing amount of criticism. "If the rule is viewed as a presumption against change of the common law . . . then in most cases it contradicts legislative purpose" in that the Legislature's purpose in enacting most laws is to remedy perceived defects in the common law. 3 N. Singer, *Statutory Construction* § 61.04 (4th ed. 1986). Thus, the mere fact that RCW 64.40.020 might change the existing state of the law is no reason to interpret it so that it does not. Regardless, because the parties have not briefed the issue, we decline to rule on the continued viability of this rule of statutory construction. Instead, we accept the rule for purposes of this appeal.

However, in making its strict construction argument, the County has failed to correctly identify the "common law" with which RCW 64.40.020 is concerned. As already noted, the issue in this case is not whether quasi-judicial immunity for individuals has been abrogated, but whether a governmental entity's vicarious immunity has been abrogated. As we have already noted, the common law as to *individual* immunity in this situation is still an open question. Any immunity the *municipality* might have is only derivative from or secondary to that individual immunity. This derivative, vicarious immunity is traced to the 1966 *Creelman* decision, which has since been somewhat limited by our recent decision in *Babcock v. State, supra* at 619-22, where we held that the State does not get the benefit of the qualified or absolute immunity of its Department of Social and Health Services caseworkers. Therefore, while we do not call the holding of *Creelman* into question, we do note that its establishment at the common law is even less certain than the individual quasi-judicial immunity which the County has argued.

Thus, keeping in mind the rule that intent to change the common law must be made clear, but also noting the somewhat unclear state of the common law at issue, we

find that RCW 64.40.020 evidences a legislative intent to abrogate the *Creelman* rule of vicarious municipal immunity for the quasi-judicial acts of its officials.

Interpreting the statute any other way would render it meaningless or, at the very least, any other interpretation would create an inconsistency within the statute, both of which we assume the Legislature does not intend to do. *See State v. McCullum*, 98 Wn.2d 484, 493, 656 P.2d 1064 (1983); *Avlonitis v. Seattle Dist. Court*, 97 Wn.2d 131, 138, 641 P.2d 169, 646 P.2d 128 (1982).

The statute can be interpreted as creating a cause of action only for quasi-judicial acts such as the grant or denial of a conditional use permit. If this is the case, then the statute is useless, since we are assuming for purposes of this appeal that under *Creelman* local governments would be immune for all such quasi-judicial acts.

On the other hand, the County argues that "ministerial" acts, such as the issuance of a building permit, could be covered by the statute, and that the statute is therefore not useless. The problem is that if such an act *is* ministerial as the County claims, *see State ex rel. Craven v. Tacoma*, 63 Wn.2d 23, 27, 385 P.2d 372 (1963), an inconsistency would be created within the statute. *But see Polygon Corp. v. Seattle*, 90 Wn.2d 59, 65, 578 P.2d 1309 (1978); *Seattle Shorelines Coalition v. Justen*, 93 Wn.2d 390, 394, 609 P.2d 1371 (1980). That is, RCW 64.40.020(1) would create liability *only* for an arbitrary or capricious "ministerial" decision (a quasi-judicial decision would be immune). However, under RCW 64.40.020(3), no cause of action is created for "unintentional . . . ministerial errors". This language implies that a cause of action is created only for intentional ministerial errors. Thus, under the County's reasoning, the same statute seems to require two different standards of conduct to establish liability for one act: "arbitrary or capricious conduct" and "intentional conduct". Either subsection (1) or subsection (3) would be superfluous. "Statutes should not

be interpreted in such a manner as to render any portion meaningless, superfluous or questionable." *Avlonitis v. Seattle Dist. Court, supra* at 138.

Reading subsection (1) as abrogating a municipality's quasi-judicial immunity resolves the apparent conflict. Under this interpretation, liability for quasi-judicial and administrative acts is determined according to the "arbitrary, capricious or unlawful" standard of subsection (1), while liability for ministerial acts is determined according to the "intent" standard of subsection (3). We adopt this interpretation as more indicative of the legislative intent in enacting RCW 64.40.

Our interpretation of the statute is buttressed by reference to the legislative intent expressed in the legislative history of RCW 64.40. The County's position is that only historical matter appearing in the House or Senate Journals may be used as a source of legislative history and since nothing relevant to the present inquiry appears in either journal, legislative history cannot be used in this case to determine legislative intent. Therefore, the County takes the categorical position that because RCW 64.40 makes no mention of quasi-judicial actions, the Legislature could not have intended abrogation of immunity. Brief of Respondent, at 9.

The County's argument is too broad. It is true that we have expressed restrictions upon sources of legislative history. *See North Coast Air Servs., Ltd. v. Grumman Corp.*, 111 Wn.2d 315, 326, 759 P.2d 405 (1988); *Snow's Mobile Homes, Inc. v. Morgan*, 80 Wn.2d 283, 291, 494 P.2d 216 (1972). We have never, however, limited our consideration of legislative history materials to those contained in the journals. Our focus is not on where the materials are found, but on whether they are sufficiently probative of the Legislature's intent. Therefore, it is of some assistance to our interpretation to look to such documentation as may bear on the issue.

A memorandum from the chair of the House Local Government Committee to the Senate Judiciary Committee and its members concerning the bill which became RCW 64.40 contains the following:

> SHB 1006 applies to quasi-judicial acts and not to comprehensive plans or zoning ordinances, which are legislative actions.

Particularly when a party claims a complete lack of intent on the part of the Legislature as to the purpose of a bill, a formal document, such as this one, from a committee chair to the appropriate committee and its members in the other chamber is entitled to consideration. The weight and relevance are determined by the reviewing court. Here, the memorandum is persuasive evidence that the Legislature, in enacting RCW 64.40, did not intend local governments to be immunized from liability for the quasi-judicial acts of their land use officers.

Further support for this interpretation of the statute is found by examining the policy reasons which, in general, justify granting quasi-judicial immunity to individual governmental officers.

Absolute immunity necessarily leaves wronged claimants without a remedy. This runs contrary to the most fundamental precepts of our legal system. Therefore, in determining whether a particular act entitles the actor to absolute immunity, we must start from the proposition that there is no such immunity. *Butz v. Economou*, 438 U.S. 478, 506, 57 L. Ed. 2d 895, 98 S. Ct. 2894 (1978) ("No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.") (quoting *United States v. Lee*, 106 U.S. 196, 220, 27 L. Ed. 171, 1 S. Ct. 240 (1882)). Only when the person claiming absolute immunity can prove that such immunity is justified will we impose it.

In order for a government official to make this showing, he or she must establish three things. First, the official must show that he or she performs a function which is analogous to that performed by persons entitled to absolute immunity, such as judges or legislators. Second, the official must show how the policy reasons which justify absolute immunity for the judge or legislator also justify absolute immunity for that official. And third, the official must show that sufficient safeguards exist to mitigate the harshness to the claimant of an absolute immunity rule. *Butz v. Economou, supra* at 512-13; *see* Note, *Quasi-Judicial Immunity of State Officials:* Butz v. Economou's *Distorted Legacy*, 1985 U. Ill. L. Rev. 401, 417-20.

Our opinion in *Taggart v. State*, 118 Wn.2d 195, 822 P.2d 243 (1992) identified factors which can be used to assess whether a challenged administrative action is functionally comparable to judicial action, in the context of parole board action. Our analysis here augments the discussion in *Taggart*. For example, in *Taggart*, at 205, we noted that whether safeguards exist to protect against errors is one factor which is important in deciding whether a challenged administrative action is functionally comparable to judicial action. However, *Taggart* should not be read as implying that in the absence of any form of procedural safeguards, other factors would be sufficient to justify quasi-judicial immunity.

Thus, the discussion which follows is more detailed in the analysis to be applied, particularly in the discussion of relevant policy considerations, but it does not signify a departure from the analysis in *Taggart*.

As to the first element which the official must establish, we accept the parties' assumption that the hearing examiner and county council were performing judgelike acts when they passed on the conditional use permit. *See Beach v. Board of Adj.*, 73 Wn.2d 343, 345, 438 P.2d 617 (1968);

Pleas v. Seattle, 112 Wn.2d 794, 805 n.1, 774 P.2d 1158 (1989).

The second element of the analysis is concerned with policy. Absolute immunity for judges is thought necessary because

> the proper functioning and indeed the very survival of any independent, dispute-resolving system requires that the dread of subsequent lawsuits be prevented from becoming a factor in a judge's assessment of the merits of a case. . . . Absolute immunity, as the Supreme Court has acknowledged, leaves the genuinely wronged person without civil redress. However, broader societal concerns dictate that the balance be struck in favor of freeing judges from the constant fear of retaliatory suits.

Sellars v. Procunier, 641 F.2d 1295, 1299-1300 (9th Cir.), *cert. denied*, 454 U.S. 1102 (1981); *see also Butz v. Economou, supra*. This statement of policy breaks down into a number of related categories. First, absolute immunity prevents injustice to officials whose position requires them to exercise discretion. Second, it prevents the paralysis that might otherwise result if officials were constantly preoccupied with the liability-creating potential of their acts. Third, it alleviates the fear that because of the potential of personal liability, no one will hold public office. *German v. Killeen*, 495 F. Supp. 822, 830 (E.D. Mich. 1980); *see* Pearlman, *Section 1983 and the Liability of Local Officials for Land Use Decisions*, 23 Wash. U.J. Urb. & Contemp. L. Ann. 57, 63 (1982); Note, 1985 U. Ill. L. Rev. at 409-10; Mashaw, *Civil Liability of Government Officers: Property Rights and Official Accountability*, 42 Law & Contemp. Probs. 8, 27 (1978); Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 Harv. L. Rev. 209, 220 (1963-1964). Fourth, it avoids the possibility of a conflict of interest, in that it avoids the situation where a judge or judicial officer could be sued for his or her

decision by the party from one side of a controversy, but not by the party from the other. Mashaw, *supra* at 28. This is a particularly appropriate concern in the land use context because it is usually only the developer who has been denied a permit who can sue for damages after an adverse decision. Finally, immunity protects the conscientious judge or judicial official, who would be most at risk if there were no immunity. Block, Stump v. Sparkman *and the History of Judicial Immunity*, 1980 Duke L.J. 879, 886-87.

These policy concerns are not implicated in this case in the same way they would be if individual immunity were at stake. The policy justifications listed above are concerned primarily with maintaining the independence of individual officers. Although agency immunity is based on the same policy grounds, *see Creelman v. Svenning*, 67 Wn.2d 882, 410 P.2d 606 (1966), such immunity does not advance the policy as strongly as individual immunity. The threat of agency liability will not necessarily hamper individual decisionmaking as much as the threat of individual liability will. Moreover, finding absolute immunity for the municipality where there is also absolute immunity for the individual leaves the victim entirely without a remedy, whereas eliminating municipal immunity accommodates both the decisionmaker and the victim by allowing a certain degree of independence in individual decisionmaking, while also providing the wronged claimant with a remedy. *See Owen v. Independence*, 445 U.S. 622, 653 n.37, 654-56, 63 L. Ed. 2d 673, 100 S. Ct. 1398, *reh'g denied*, 446 U.S. 993 (1980); *see also Babcock v. State*, 116 Wn.2d 596, 620-22, 809 P.2d 143 (1991). *But see Creelman v. Svenning, supra* at 885; *Babcock v. State, supra* at 637-39 (Andersen, J., concurring in part, dissenting in part). Thus, policy concerns counsel in favor of the abrogation of governmental immunity.

The third element of the *Butz* test relates to the procedural safeguards which help to insure the correctness of

officials' decisions and therefore reduce the need for a damages action against the officer. In *Butz*, the Supreme Court listed some of these factors. These include: (1) the insulation of the judge from political influences, (2) the importance of precedent in resolving controversies, (3) the adversary nature of the process, and (4) the correctability of error on appeal. *Butz v. Economou, supra* at 512.

These factors do not apply with the same force in the quasi-judicial land use setting as they do in the purely judicial setting. Neither hearing examiners, board of adjustment members, nor county or city council members are immune from political influence. The council members are elected and the hearing examiner and board members are appointed for limited terms. RCW 36.70.220 (board); RCW 36.70.970 (hearing examiner).

Also, precedent is not as important in the land use regulatory setting as in the judicial setting. Board of adjustment members and hearing examiners are required to exercise their discretion and judgment to determine on a case-by-case basis whether a particular land use should be permitted. Because one use may have been permitted in the past does not necessarily mean the same type of use should now be permitted in the same place, and in fact it may actually preclude a proposed use.

Likewise, the nature of the administrative process is distinctly less adversarial than the judicial process. Although land use hearings *may* be adversarial in nature, they need not be. Such decisions are often made without opposition. Moreover, the rules of evidence and procedure are somewhat relaxed, thus lessening slightly the reliability of the information upon which the ultimate decision is based.

Finally, errors in an administrative proceeding are less likely to be corrected on appeal than errors in a judicial proceeding. Administrative decisions such as this one are usually appealable. However, the appeal is usually limited

to the record established in the agency hearing which, due to the previously explained evidentiary and procedural problems, may be inadequate or one sided. The appellate court must also give deference to the agency's interpretation of laws when the agency is uniquely qualified to interpret those laws. *See Renton Educ. Ass'n v. Public Empl. Relations Comm'n*, 101 Wn.2d 435, 680 P.2d 40 (1984). As a result, appeal from an administrative decision is less likely to correct errors in the prior decision than an appeal from a judicial decision would be.

In view of this analysis some commentators have concluded that *individuals* performing quasi-judicial acts such as those at issue here should not receive absolute quasi-judicial immunity. *See, e.g.*, Jaffe, *supra* at 209; Note, 1985 U. Ill. L. Rev. 401, *supra*; Note, *Quasi-Judicial Immunity: Its Scope and Limitations in Section 1983 Actions*, 1976 Duke L.J. 95. While we are not deciding that issue, it is apparent that if the immunity of individual officers is in question, then the immunity of the local government which employs them is certainly in question. In any event, the factors respecting individual immunity which we consider relevant to the question of agency immunity certainly weigh in favor of no immunity for the agency.

The County, however, makes one final argument in support of maintaining governmental immunity. It argues that judges could be included within RCW 64.40.010(1)'s definition of "agency" and that if the statute is interpreted as abrogating quasi-judicial immunity, it could therefore also be interpreted as abrogating judicial immunity. The County argues that the Legislature could not have intended to abrogate judicial immunity when it enacted RCW 64.40.020 so the statute should not be interpreted as abrogating quasi-judicial immunity. This argument is entirely without merit.

We turn first to the definition of agency. Agency is defined as the "state of Washington" and "any of its

political subdivisions, including any . . . public body exercising regulatory authority or control over the use of real property in the state." RCW 64.40.010(1). Presumably, the County would include judges within the term "body" in order to qualify them as agencies. This argument fails because judges are individuals, while "body" is defined as "a group or number of persons or things" or "a group of individuals united by a common tie or organized for some purpose". *Webster's Third New International Dictionary* 246 (1981). Moreover, judges do not exercise "regulatory authority or control" over property. "Regulation" is defined in RCW 64.40.010(5) as "any ordinance, resolution, or other rule or regulation adopted pursuant to the authority provided by state law, which imposes or alters restrictions, limitations, or conditions on the use of real property." This definition does not encompass judicial decisions. Since judges do not "regulate" under the statute, they cannot exercise "regulatory authority or control" so as to qualify as an agency under the statute.

Regardless of the terms of the statute, the analysis of whether a statute could abrogate judicial immunity is necessarily much different than the analysis of whether a statute can abrogate a municipality's vicarious immunity for the quasi-judicial acts of its officers. Judicial immunity traces its origin back at least to the 17th century in England. *See* Block, *supra* at 885 (citing *Floyd v. Barker*, 77 Eng. Rep. 1305 (K.B. 1607)). It has been termed "a general principle of the highest importance to the proper administration of justice". *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347, 20 L. Ed. 646 (1872). The vicarious municipal immunity at issue here, on the other hand, has only been recognized in this state since 1966, *see Creelman v. Svenning, supra*, and has not been applied in the most recent case to raise the issue, *see Babcock v. State, supra*. It would take a much greater showing of intent than is present in this case to abrogate judicial immunity, *if it could be done at all.*

We therefore hold that under RCW 64.40.020 an "agency" *can* be liable for the quasi-judicial acts of its officers. The portion of the trial court's order which concludes otherwise is in error. However, the trial court alternatively held that even if RCW 64.40.020 did apply in this case, "plaintiff has not demonstrated that the defendants' actions were made with knowledge that the actions were unlawful or were in excess of lawful authority, or that the defendants should reasonably have known that the actions were unlawful or in excess of lawful authority." Clerk's Papers of Plaintiff, at 15-16. Judge Thibodeau therefore granted summary judgment to the County.

To determine whether the grant of summary judgment to the County was proper, we must determine whether the interpretation of RCW 64.40.020 upon which the trial court based its alternative holding is correct. That holding assumed that RCW 64.40.020(1) *requires* knowledge of unlawfulness. This interpretation of the statute is incorrect. RCW 64.40.020(1) creates a cause of action for acts which are "arbitrary, capricious, unlawful, *or* exceed lawful authority. . . ." (Italics ours.) That same section further provides that an "action is *unlawful or in excess of lawful authority* only if the final decision of the agency was made with knowledge of its unlawfulness or . . . it should reasonably have been known to have been unlawful". (Italics ours.)

The fact that the disjunctive "or" is used in the first part of the statute shows that acting *either* arbitrarily and capriciously *or* unlawfully or in excess of lawful authority will create a cause of action. *Childers v. Childers*, 89 Wn.2d 592, 595, 575 P.2d 201 (1978). This conclusion is strengthened when actions which are "unlawful or exceed lawful authority" are dealt with separately later on in the same section. Thus, knowledge of unlawfulness is not required for a cause of action under RCW 64.40.020(1), but is only

required when the cause of action is based on conduct which is unlawful or exceeds lawful authority.

Here, appellant is basing its cause of action on arbitrary and capricious acts, and therefore need not show knowledge of unlawfulness. Judge Thibodeau was therefore incorrect in dismissing appellant's claim under RCW 64.40.020(1) and thus was in error when he granted the County's motion for summary judgment.

We must now determine whether the trial court also erred in denying appellant's motion for summary judgment. Appellant correctly notes that all it needs to show to be entitled to recovery under the statute is arbitrary or capricious conduct. It asserts that the prior decision by Judge Kershner, which concluded that the denial of the permit on the third application was arbitrary and capricious, is binding at this stage of the litigation under the doctrine of collateral estoppel. *See King v. Seattle*, 84 Wn.2d 239, 242, 525 P.2d 228 (1974); *Jensen v. Torr*, 44 Wn. App. 207, 721 P.2d 992, *review denied*, 107 Wn.2d 1004 (1986). Appellant also contends that the doctrine of "law of the case" prevents relitigation of the "arbitrary and capricious" determination. Appellant therefore contends that it has satisfied the requirements of the statute and is entitled to summary judgment.

We initially note that the law of the case doctrine is entirely inapplicable here. The term "law of the case" means different things in different circumstances. In one sense, it refers to "the binding effect of determinations made by the appellate court on further proceedings in the trial court on remand." (Footnote omitted.) 15 L. Orland & K. Tegland, Wash. Prac., *Judgments* § 380, at 55 (4th ed. 1986). The term also refers to the "rule that the instructions given to the jury by the trial court, if not objected to, shall be treated as the properly applicable law." (Footnote omitted.) 15 L. Orland & K. Tegland, *supra* at 56. Finally, "the term is employed to express the principle

that an appellate court will generally not make a redetermination of the rules of law which it has announced in a prior determination in the same case or which were necessarily implicit in such prior determination." (Footnote omitted.) 15 L. Orland & K Tegland, *supra* at 56. This final use of the term has been limited by case law and rules of court. *See Folsom v. County of Spokane*, 111 Wn.2d 256, 263-64, 759 P.2d 1196 (1988); RAP 2.5(c).

Appellant does not make clear which use of the term it relies on here. None of them, however, is applicable. The first and third uses require a prior appellate decision. *See Fluke Capital & Mgt. Servs. Co. v. Richmond*, 106 Wn.2d 614, 620, 724 P.2d 356 (1986). The County did not appeal Judge Kershner's decision. The second use of the term requires jury instructions. No such instructions were given in the certiorari action because there was, and could be, no jury. *See* RCW 7.16.030-.140.

Collateral estoppel, on the other hand, is available to appellant here. That doctrine prevents the relitigation of an issue or determination of fact after the party sought to be estopped has had a full and fair opportunity to present his or her case. *Jensen v. Torr, supra* at 213. Initially, we note that both Judge Kershner's decision on the writ of certiorari and Judge Thibodeau's decision which is presently at issue are parts of the same case. Thus, the usual collateral estoppel scenario, where the decision in one case is sought to be used in a different case, is not present.

However, the parties agree that collateral estoppel is the appropriate doctrine to be addressed here. They are correct. The nature of certiorari, as will be discussed, is such that its procedure cannot be used to decide damages issues. Therefore, although the certiorari and damages causes of action were included by appellant in the same complaint, they were necessarily decided separately. The County could have appealed the certiorari decision, RCW 7.16.350, and did not do so. The two separate superior

court actions can therefore be considered "different cases" for purposes of discussing collateral estoppel. *See* 15 L. Orland & K Tegland, Wash. Prac., *Judgments* § 376 (4th ed. 1986) (and cases cited therein).

The County claims, however, that the doctrine is not applicable in this case because Judge Kershner's "finding" in the prior action was not necessary to decide the case, was superfluous, and should therefore be ignored. The County cites *King Cy. Water Dist. 54 v. King Cy. Boundary Review Bd.*, 87 Wn.2d 536, 554 P.2d 1060 (1976) and *Grader v. Lynnwood*, 45 Wn. App. 876, 728 P.2d 1057 (1986) to support this argument. Those cases are inapposite, however, because Judge Kershner's "finding" here *was not* superfluous. In order to grant relief under a writ of certiorari, a superior court *must* determine that a judicial or quasi-judicial action was one of a number of things, including either arbitrary and capricious or contrary to law. *Williams v. Seattle Sch. Dist. 1*, 97 Wn.2d 215, 643 P.2d 426 (1982). Judge Kershner did just that in his prior decision. Since it is not superfluous, Judge Kershner's prior finding cannot be ignored. The doctrine of collateral estoppel must be examined to determine whether that prior decision should be given preclusive effect.

Four conditions must be met before the doctrine will be applied: (1) the issues in the two actions must be identical; (2) there must have been a final judgment in the first action; (3) the party against whom the estoppel is being pleaded must have been a party or in privity with a party to the first action; and (4) application of the doctrine cannot work an injustice on the party against whom it is pleaded. *Jensen v. Torr*, at 213.

The County contends that collateral estoppel does not apply here because conditions (1) and (4) of the test are not met. The County asserts that the issues in this litigation are different from those in the prior one because the prior one was decided on a writ of certiorari. The

certiorari procedure is used to correct improper judicial or quasi-judicial decisions. *Williams v. Seattle Sch. Dist. 1, supra.* As such, the judge who is considering whether to grant relief under the writ is considering *only* whether the decision made below was correct. Considerations of culpability should not enter into the decision. The present litigation, however, is concerned solely with culpability. Since the subject of this action is fault, an issue which was not considered in the action on the writ of certiorari, the County maintains that collateral estoppel is not warranted.

This argument is unpersuasive because RCW 64.40-.020(1) requires no proof of fault beyond arbitrary or capricious conduct. Since the question of whether there was arbitrary or capricious conduct was exactly the issue considered by Judge Kershner, the issues are the same.

The County also asserts, however, that it would not be fair to apply collateral estoppel here, where it has not had an opportunity to fully and fairly litigate its fault in the prior action. As already stated, an action under a writ of certiorari is not concerned with monetary liability; therefore, the issue was not considered by Judge Kershner. Also, the only evidence upon which a court decides whether to grant relief under the writ is the administrative record below. RCW 7.16.070. Therefore, the County argues, it did not have an opportunity nor any incentive to present its arguments relative to monetary liability to Judge Kershner.

This is the basis upon which the County distinguishes the cases cited by appellant. All of those cases held that prior findings in actions for mandamus were binding in later judicial actions where the question was liability. The County points out that damages can be considered by the court in a mandamus action but not in a certiorari action. RCW 7.16.210. Moreover, additional evidence can be taken in a mandamus action. RCW 7.16.210, .250.

Although the County's argument has some merit, it is not unfair to make the County live with Judge Kershner's decision under the facts of this case. The County cannot claim to be surprised that Judge Kershner's decision might be used to establish its monetary liability, because at the time the writ of certiorari was issued, appellant's complaint also included all three of appellant's claims for damages. The County therefore cannot claim that it would be unfair to apply collateral estoppel here because it did not anticipate an action for damages based on the same conduct. Moreover, while the County may not have been able to supplement the administrative record in the certiorari action, it did have the opportunity to argue its case to the judge, RCW 7.16.110, an opportunity of which it took full advantage.

Since the issues are identical and application of the doctrine will not work an injustice on the County, we hold collateral estoppel prevents relitigation of Judge Kershner's finding that the County acted arbitrarily and capriciously in denying the conditional use permit. The effect of this holding is that, for purposes of this action, such arbitrary and capricious conduct is conclusively established. Since this is all that is required to establish a cause of action under RCW 64.40.020(1), appellant has demonstrated that it does have a cause of action against the County under that statute. Appellant's motion for partial summary judgment, establishing the County's liability under RCW 64.40.020(1), should therefore be granted. Accordingly, we reverse the trial court's denial of appellant's summary judgment motion and remand to the trial court with instructions to grant the motion.

II
SECTION 1983

Appellant also claims denial of the conditional use permit violated the federal constitutional guaranties of equal protection and due process. It therefore seeks a damages

remedy under 42 U.S.C. § 1983. Judge Thibodeau denied this claim, stating that appellant "has not shown that the denial was made with 'purposeful discrimination or at least an allegation that the misdeeds were knowing or reckless.' " (Citation omitted.) Clerk's Papers of Plaintiff, at 16. We reverse.

42 U.S.C. § 1983 reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Thus, in order to proceed in a § 1983 action, a plaintiff must show that some person deprived plaintiff of a federal constitutional or statutory right, and that person must have been acting under color of state law. *Parratt v. Taylor*, 451 U.S. 527, 535, 68 L. Ed. 2d 420, 101 S. Ct. 1908 (1981), *overruled in part on other grounds in Daniels v. Williams*, 474 U.S. 327, 88 L. Ed. 2d 662, 106 S. Ct. 662 (1986); *American Legion Post 32 v. Walla Walla*, 116 Wn.2d 1, 12, 802 P.2d 784 (1991).

In addressing the § 1983 claim, we first observe that liability will not be found if there is immunity from a § 1983 suit. *See Tenney v. Brandhove*, 341 U.S. 367, 95 L. Ed. 1019, 71 S. Ct. 783 (1951); *Pierson v. Ray*, 386 U.S. 547, 18 L. Ed. 2d 288, 87 S. Ct. 1213 (1967).

The County can raise no immunity defense. It is possible that the hearing examiner and county council members are individually absolutely immune from a § 1983 suit because they were acting in a quasi-judicial capacity. *See Schlegel v. Bebout*, 841 F.2d 937, 942 (9th Cir. 1988); *Mey-*

ers v. Contra Costa Cy. Dep't of Social Servs., 812 F.2d 1154, 1159 (9th Cir.), *cert. denied*, 484 U.S. 829 (1987); *Ross v. Meagan*, 638 F.2d 646, 648 (3d Cir. 1981); *Centennial Land & Dev. Co. v. Medford*, 165 N.J. Super. 220, 397 A.2d 1136 (1979).

However, the County does not enjoy the immunity of its agents in actions for compensatory damages under § 1983. *Kentucky v. Graham*, 473 U.S. 159, 166-67, 87 L. Ed. 2d 114, 105 S. Ct. 3099 (1985); *Owen v. Independence*, 445 U.S. 622, 654-56, 63 L. Ed. 2d 673, 100 S. Ct. 1398, *reh'g denied*, 446 U.S. 993 (1980); *Ybarra v. Reno Thunderbird Mobile Home Village*, 723 F.2d 675, 681 (9th Cir. 1984). *But cf. Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 69 L. Ed. 2d 616, 101 S. Ct. 2748 (1981) (municipality has absolute immunity to suit for punitive damages). Thus, appellant is correct that *Collins v. King Cy.*, 49 Wn. App. 264, 271, 742 P.2d 185 (1987), which appears to hold that an officer's individual immunity can be imputed to the officer's employing governmental agency, is wrong and must be overruled to the extent that it so holds. We do so now.

A "person" must act. *See Monell v. Department of Social Servs.*, 436 U.S. 658, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978). There is no question that a city or county can be a "person" for purposes of establishing liability under § 1983. *See Monell v. Department of Social Servs., supra.* The County is therefore a "person" for purposes of our review.

The person must act "under color of state law". *See Monroe v. Pape*, 365 U.S. 167, 5 L. Ed. 2d 492, 81 S. Ct. 473 (1961). There is no contention that the County was not acting under color of state law when it denied the conditional use permit. We therefore assume that the County was acting under color of state law for purposes of deciding this appeal.

The act must result in "the deprivation of any rights, privileges, or immunities secured by the Constitution or laws," *i.e.*, the deprivation of a federally created right.

The primary issue as to the County's liability under § 1983 is whether the County actually caused appellant any injury. This question hinges on whether the denial of the permit constituted the County's "official policy". If it was the County's "official policy", then the County will be held to have caused any constitutional deprivation appellant may have suffered.

Appellant repeatedly asserts that this is an "official capacity" action, Brief of Appellant, at 2-3, in other words, an action against the County itself, not against the hearing examiner and the county council members in their individual capacities.

> On the merits, to establish *personal* liability in a § 1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right. . . . More is required in an official-capacity action, however, for a governmental entity is liable under § 1983 only when the entity itself is a "'moving force'" behind the deprivation. . .thus, in an official-capacity suit the entity's "[official] policy or [unofficial] custom" must have played a part in the violation of federal law.

Graham, at 166. In other words, "[r]espondeat superior may not be the basis for [government] liability" under § 1983. *Hontz v. State*, 105 Wn.2d 302, 310, 714 P.2d 1176 (1986) (citing *Monell v. Department of Social Servs.*, *supra* at 694).

This rule is grounded in the language of § 1983 itself, which requires a defendant to "subject" the plaintiff to a violation of his or her constitutional rights before the plaintiff has a cause of action. The Supreme Court has

held in *Monell* that for the municipality itself to "subject" the plaintiff to the injury, the act of its agent which actually causes the injury must be pursuant to municipal policy. Therefore, the "policy" requirement at issue here is concerned with causation, not immunity. *See Pembaur v. Cincinnati*, 475 U.S. 469, 478-80, 89 L. Ed. 2d 452, 106 S. Ct. 1292 (1986); *St. Louis v. Praprotnik*, 485 U.S. 112, 122, 99 L. Ed. 2d 107, 108 S. Ct. 915 (1988); *see also* S. Nahmod, *Civil Rights and Civil Liberties Litigation: The Law of Section 1983*, § 6.07 (2d ed. 1986 & Supp. 1990) (policy requirement not only concerned with cause in fact, but also with duty).

The first case to consider whether a single act by a local government officer could lead to local government liability was *Pembaur v. Cincinnati, supra* at 481. In that case, an assistant prosecuting attorney authorized police officers to "go in and get" witnesses who had previously refused police requests to produce themselves. The Court found that the prosecuting attorney's authorization constituted county policy. *Pembaur* is significant in that a majority of the Court for the first time determined that a single act *can* lead to local government liability. *Pembaur*, at 480. It is also significant in that it seemed to adopt a test for determining when an act is "policy" which differs from the ordinary understanding of the word. The focus in *Pembaur* was not on whether the assistant prosecutor's decision was a "policy" decision in the sense of "a definite course or method of action selected from among alternatives and in light of given conditions to guide and determine present and future decisions." *Oklahoma City v. Tuttle*, 471 U.S. 808, 823 n.6, 85 L. Ed. 2d 791, 105 S. Ct. 2427 (quoting *Webster's Ninth New Collegiate Dictionary* 910 (1983)), *reh'g denied*, 473 U.S. 925 (1985). Rather, the focus was on whether the assistant prosecutor was a final policymaker. The Court essentially read "policy" (in the usual sense of the word) out of the test by defining policy in terms of "a course of action tailored

to a particular situation and not intended to control decisions in later situations." *Pembaur*, at 481. In other words, a "policy" decision could be any decision, so long as it was made by the right person.

Thus, the focus in determining whether a local government officer's act is attributable to the local government is whether the officer is the final policy-making authority for the local government in the area concerning the decision which the officer made. *Pembaur*, at 481-83 (plurality). In other words, "municipal liability under § 1983 attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." *Pembaur*, at 483-84 (plurality).

This accords with the purpose behind *Monell's* policy requirement. "*Monell* reasoned that recovery from a municipality is limited to acts that are, properly speaking, acts 'of the municipality'—that is, acts which the municipality has officially sanctioned or ordered." *Pembaur*, at 480. "When a local governmental unit chooses to exercise its power by delegating to officials the final authority to act in a particular matter, the policymaker acts on behalf of the local government in the matter." (Footnote omitted.) Snyder, *The Final Authority Analysis: A Unified Approach to Municipal Liability Under Section 1983*, 1986 Wis. L. Rev. 633, 657. Thus, where the final policymaker acts, the municipality acts and can therefore be held liable under § 1983.

In fact, the *Pembaur* opinion seems to have anticipated the present case when it noted that

> No one has ever doubted . . . that a municipality may be liable under § 1983 for a single decision by its properly constituted legislative body—whether or not that body had taken similar action in the past or intended to do so in the future—because even a single

> decision by such a body unquestionably constitutes an act of official government policy.

Pembaur, at 480. In the present case, the legislative body of Snohomish County, its county council, denied a conditional use permit, a 1-time event. The factual stance of the present case is indistinguishable from that discussed in *Pembaur* and should therefore render the County subject to liability under § 1983.

Pembaur's interpretation of the official policy requirement has been reaffirmed by later cases. In *St. Louis v. Praprotnik*, 485 U.S. 112, 99 L. Ed. 2d 107, 108 S. Ct. 915 (1988) an architect sued his supervisor and the City for allegedly retaliatory employment practices which resulted in his eventual termination. He alleged that his employment supervisor was the final policy-making authority and that under *Pembaur*, the supervisor's decisions therefore represented city policy. Justice O'Connor, speaking for the plurality, held that the trial court's instructions regarding "official policy" were legally incorrect and therefore remanded to the Court of Appeals. In the course of its discussion, the plurality distilled four principles from *Pembaur*. Of those four, two are important for our purposes. First, the plurality noted that "only those municipal officials who have 'final policymaking authority' may by their actions subject the government to § 1983 liability." *Praprotnik*, at 123 (plurality). Second, it noted that "the challenged action must have been taken pursuant to a policy adopted by the official or officials responsible under state law for making policy in *that area* of the city's business." *Praprotnik*, at 123 (plurality). Thus, the *Praprotnik* plurality essentially adopted the *Pembaur* plurality's definition of "official policy".

Justice Brennan, concurring in the *Praprotnik* judgment, took the opportunity to make his position in *Pembaur* even clearer. He noted that the policy requirement is not an

> end in itself, but rather . . . a means of determining which acts by municipal employees are properly attributed to the municipality. Congress, we held, did not intend to subject cities to liability simply because they employ tortfeasors. But where a municipality's governing legislative body inflicts the constitutional injury, the municipal policy inquiry is essentially superfluous: the city is liable under the statute whether its decision reflects a considered policy judgment or nothing more than the bare desire to inflict harm.

Praprotnik, at 139 n.3 (Brennan, J., concurring in judgment).

> [A]s long as the contested decision is made in an area over which the official or legislative body *could* establish a final policy capable of governing future municipal conduct, it is both fair and consistent with the purposes of § 1983 to treat the decision as that of the municipality itself, and to hold it liable for the resulting constitutional deprivation.

Praprotnik, at 140 (Brennan, J., concurring in judgment).

Most recently, in *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 736, 105 L. Ed. 2d 598, 109 S. Ct. 2702 (1989), the Court again reaffirmed *Pembaur*, this time in a majority. It recognized the necessity of "determining whether either [of the alleged policymakers in that case could] be considered policymakers for the school district such that their decisions may rightly be said to represent the official policy of the DISD subjecting it to liability under § 1983." The Court accordingly remanded to allow the lower court to make the determination.

Reading these three Supreme Court decisions together leads to the conclusion that a local government can be liable under § 1983 for a single act of one of its officers only where (1) one of its final policymakers acts (2) in an

area within which that policymaker *could have* established local government policy (in the usual sense).[1]

Given this definition of "official policy", disposition of this case is relatively simple. There is no question that the Snohomish County Council is the final policy-making body for Snohomish County. There is also no question that the council has the power to establish county policy relative to land use, and more specifically, to the granting or denial of conditional use permits. Such grant or denial is therefore an area within which the council *could have* established policy, even if its decision in this case does not meet the usual definition of policy. Therefore, the county council's denial of the conditional use permit is the County's official policy for purposes of establishing its liability under § 1983. *See Bateson v. Geisse*, 857 F.2d 1300, 1303 (9th Cir. 1988).

Our next inquiry is whether the County's denial of the conditional use permit violated appellant's constitutional rights. Appellant alleges that it has suffered violation of its equal protection and due process rights. Judge Thibodeau rejected this contention, dismissing appellant's § 1983 claim based on appellant's failure to prove "pur-

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[1]When local government liability is alleged based on inadequate supervision or training of local government officers who then, in a single act, cause injury, local government liability is based not so much on the individual officer's single act as on the government's failure to train or supervise, which is an ongoing process (or nonprocess). The local government "may be liable if it had a policy or custom of failing to train its employees and that failure to train caused the constitutional violation." *Collins v. Harker Heights*, ___ U.S. ___, 117 L. Ed. 2d 261, 112 S. Ct. 1061, 1068 (1992). Inadequate training can be characterized as the cause "if—and only if—the failure to train amounted to 'deliberate indifference' to the rights of persons with whom" the officers come into contact. *Collins*, 112 S. Ct. at 1068 (explaining decision in *Canton v. Harris*, 489 U.S. 378, 392, 103 L. Ed. 2d 412, 109 S. Ct. 1197 (1989). *But see* Brown, *Correlating Municipal Liability and Official Immunity Under Section 1983*, 1989 U. Ill. L. Rev. 625 (*Harris* can be interpreted as inconsistent with *Pembaur* and *Praprotnik*).

poseful discrimination or at least . . . knowing or reckless" conduct.

The trial court based its holding on a passage from *Grader v. Lynnwood*, 53 Wn. App. 431, 438, 767 P.2d 952, *review denied*, 113 Wn.2d 1001, *cert. denied*, 493 U.S. 894, 107 L. Ed. 2d 193, 110 S. Ct. 243, *reh'g denied*, 493 U.S. 986 (1989). This passage reads: "a showing of purposeful discrimination or at least an allegation that the misdeeds were knowing or reckless is necessary to sustain a § 1983 action." To the extent this suggests that § 1983 requires a greater showing of fault than required to make out the constitutional violation which is being sued upon, it is incorrect. The Supreme Court has held in *Parratt v. Taylor*, 451 U.S. 527, 68 L. Ed. 2d 420, 101 S. Ct. 1908 (1981), *overruled in part on other grounds in Daniels v. Williams*, 474 U.S. 327, 88 L. Ed. 2d 662, 106 S. Ct. 662 (1986), that § 1983 imposes no state of mind requirement beyond that necessary to establish the constitutional violation involved. Therefore, if a constitutional violation can be shown, relief is available under § 1983, assuming the other prerequisites for stating a § 1983 claim have been met. As a result, the trial court's reliance on *Grader* in this respect was error.

Nevertheless, we uphold the trial court with respect to its grant of the County's summary judgment motion on the equal protection issue. Appellant has not shown that it belongs to any *class* which is being discriminated against. It merely alleges that *it* is being discriminated against. Such a claim is more properly addressed as a substantive due process challenge.

"Along with the vast majority of federal courts, we recognize that denial of a building permit, under certain circumstances, may give rise to a substantive due process claim." (Citations omitted.) *R/L Assocs., Inc. v. Seattle*, 113 Wn.2d 402, 412, 780 P.2d 838 (1989). We see no reason to treat denial of a conditional use permit any differently.

Such denial therefore can constitute a due process violation.[2] Such a violation is made out, however, only if the decision to deny the permit is "invidious or irrational" or "arbitrary or capricious". *R/L Assocs., Inc.*, at 412. In the present case, the trial court can be interpreted as denying appellant's due process claim based on the fact that the County did not act knowingly or recklessly in denying the permit. This is the wrong standard. The standard is arbitrary or capricious and as already discussed, Judge Kershner's finding in the certiorari action that the County acted arbitrarily and capriciously in denying the permit conclusively satisfies that standard. Appellant therefore has established as a matter of law and fact that the County violated substantive due process when it denied the conditional use permit.

Because all of the other prerequisites to a § 1983 claim have been satisfied, appellant is entitled to relief. The trial court's grant of summary judgment to the County and its denial of summary judgment to appellant must therefore be reversed.

III
INTENTIONAL INTERFERENCE WITH A BUSINESS EXPECTANCY

Appellant next contends that the trial court improperly dismissed its claim of intentional interference with a business expectancy. That dismissal was based on the trial court's conclusion that the hearing examiner and the county council were entitled to quasi-judicial immunity. Appellant

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[2] In that this case involves denial of a conditional use permit, it presents a different challenge than that presented in *Presbytery of Seattle v. King Cy.*, 114 Wn.2d 320, 787 P.2d 907 (1990). Section 1983 claims in the context of challenges to land use regulations as unconstitutional takings or substantive due process violations are addressed in *Sintra, Inc. v. Seattle*, 119 Wn.2d 1, ___ P.2d ___ (1992) and *Robinson v. Seattle*, 119 Wn.2d 34, ___ P.2d ___ (1992).

claims again, based on *Monell v. Department of Social Servs.*, 436 U.S. 658, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978), that this is an "official capacity" lawsuit and that it is suing the County based on its own acts, not based on the acts of any of its agents. Therefore, the argument goes, the immunity of the County's agents does not transfer to the County as it would if the sole basis of liability were respondeat superior. *See Owen v. Independence*, 445 U.S. 622, 654-56, 63 L. Ed. 2d 673, 100 S. Ct. 1398, *reh'g denied*, 446 U.S. 993 (1980).

In other words, appellant is attempting to transplant the "official policy" analysis and all that it entails from § 1983 to state tort law. This is something we decline to do.

Although *Monell's* "official policy" analysis purports to hold local governments liable only for their own acts and not the acts of their agents, the analysis is still, like respondeat superior, just a form of vicarious liability. A governmental entity cannot takeh independent action, but must necessarily act through its agents. Therefore, the local government can only be liable, if at all, if the acts of its agents are imputed to it. *St. Louis v. Praprotnik*, 485 U.S. 112, 122, 99 L. Ed. 2d 107, 108 S. Ct. 915 (1988); Kramer & Sykes, *Municipal Liability Under § 1983: A Legal and Economic Analysis*, 1987 Sup. Ct. Rev. 249; Snyder, *The Final Authority Analysis: A Unified Approach to Municipal Liability Under Section 1983*, 1986 Wis. L. Rev. 633, 636 n.13. The only difference between the official policy doctrine and respondeat superior liability is that the official policy analysis only imputes the acts of *some* of the entity's agents to the entity, while respondeat superior imputes *all* of the agents' acts (within certain limits) to the entity.

This difference in vicarious liability has led to different results in terms of vicarious immunity. The Supreme Court has determined on a policy basis that for purposes of § 1983 and the limited vicarious liability scheme created by

Monell, a local governmental entity does not enjoy the immunity of its agents. *Owen*, at 654-56. We, on the other hand, have recognized that for purposes of the complete vicarious tort liability (respondeat superior) we impose in the quasi-judicial context, a local governmental entity *does* enjoy the immunity of its agents. *Creelman v. Svenning*, 67 Wn.2d 882, 885, 410 P.2d 606 (1966).

Our decision in *Creelman* considered the same policy concerns presented to the Supreme Court in *Owen*, but in the different context of our different vicarious liability scheme. We therefore came to a different result. Not only would it be inappropriate for us to follow a nonbinding decision which does not involve the same considerations as those at issue here, but it would also create unwanted and unnecessary confusion. We decline to apply the "official policy" and immunity analyses of § 1983 to state tort law claims such as the one presented here by appellant.

Instead, we retain respondeat superior as the basis of local entity tort liability for the acts of their officers. As a result, "public policy. . . requires immunity for both the state and the county for acts of judicial and quasi-judicial officers in the performance of the duties which rest upon them . . . ." *Creelman v. Svenning, supra* at 885. The only way the County could be liable to appellant is through the acts of its quasi-judicial officers, the hearing examiner and the county council members. As we have already stated, the parties agree the officers are protected by absolute quasi-judicial immunity and for purposes of this appeal, we assume the parties are correct. Therefore, the County is immune from suit on this cause of action. The trial court properly granted summary judgment to the County on this issue.

IV
ATTORNEY FEES

Both parties request attorney fees on appeal pursuant to RAP 18.1. Both parties base their requests on RCW 64.40.020(2) and 42 U.S.C. § 1988, both of which require a person to be a "prevailing party" before attorney fees can be recovered. The County, as the losing party, therefore does not get its fees.

Appellant, however, is a prevailing party because we direct that summary judgment as to liability be entered in its favor. "Under section 1988 a prevailing plaintiff should ordinarily recover attorneys fees unless 'special circumstances' exist that militate against making such an award." *Toussaint v. McCarthy*, 826 F.2d 901, 903 (9th Cir. 1987). No such special circumstances exist here. We therefore hold that appellant is entitled to recovery of the attorney fees it incurred in this appeal under either RCW 64.40.020(2) or 42 U.S.C. § 1988. *Toussaint v. McCarthy, supra* at 904. However, since we were provided with no information relative to appellant's attorney fees on this appeal, we remand to the trial court for establishment of an appropriate award. *See Finch v. Vernon*, 877 F.2d 1497 (11th Cir. 1989). Appellant may request recovery of the attorney fees it expended in the trial court on remand.

V
CONCLUSION

We hold the trial court improperly granted summary judgment to the County and improperly denied summary judgment to appellant. Appellant has conclusively established causes of action under RCW 64.40.020(1) and 42 U.S.C. § 1983. We further hold that appellant's tortious interference with a business expectancy claim is precluded by the County's absolute immunity for the torts of its immune officials.

We therefore reverse and remand with instructions for the trial court to enter partial summary judgment in favor of appellant on the issue of liability under RCW 64.40.020(1) and 42 U.S.C. § 1983. We uphold the trial court, however, in its grant of summary judgment to the County on the claim of intentional interference with a business expectancy. We also award appellant reasonable attorney fees on appeal, to be set by the trial court on remand, under RCW 64.40.020(2) or 42 U.S.C. § 1988.

UTTER, DOLLIVER, ANDERSEN, DURHAM, SMITH, GUY, and JOHNSON, JJ., concur.

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION ONE

No. 25353-1-I

LUTHERAN DAY CARE,

Appellant,

v.

SNOHOMISH COUNTY; THE SNOHOMISH COUNTY COUNCIL, and THE SNOHOMISH COUNTY HEARING EXAMINER,

Respondents.

ORDER OF CERTIFICATION

A panel of the court has reviewed this case prior to argument and determined that it involves issues of broad public import which require prompt and ultimate determination, including:

> Whether plaintiff's cause of action under RCW Ch. 64.40 is barred by judicial immunity.

This case having met the criteria of RCW 2.06.030(d); Now, therefore, it is hereby

ORDERED that the case is certified to the Supreme Court for such determination as that court deems appropriate.

Done this 28th day of September, 1990.

/s/ Coleman, CJ

/s/ Grosse

/s/ Webster, J.

APPENDIX C

SUPERIOR COURT OF WASHINGTON FOR SNOHOMISH COUNTY

NO. 86-2-06611-8

LUTHERAN DAY-CARE, a non-profit corporation,
Petitioner/Plaintiff,

vs.

SNOHOMISH COUNTY; THE SNOHOMISH COUNTY COUNCIL; and THE SNOHOMISH COUNTY HEARING EXAMINER,
Respondent/Defendants.

FILED

Dec 20 2:56 PM '89

KAY D. ANDERSON
COUNTY CLERK
SNOHOMISH CO. WASH.

NOTICE OF APPEAL TO COURT OF APPEALS

COMES NOW the Plaintiff, Lutheran Day Care, by and through its attorney of record Gregory L. Bertram, and seeks review by the designated appellate court of the Memorandum Decision on Motion for Summary Judgment entered on November 22, 1989 in the above captioned matter.

DATED this 19th day of December, 1989.

GREGORY L. BERTRAM, P.C.

/s/ Gregory L. Bertram
Gregory L. Bertram
Attorney for Plaintiff

Gregory L. Bertram
121 - 5th Avenue North, #301
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(206)774-2855

Seth Dawson
Prosecuting Attorney of Snohomish County
Carol Wiebel, Deputy Prosecutor
2918 Colby Avenue, Suite #203
Everett, WA 98201
(206)388-6330

APPENDIX D

IN THE
SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

NO. 86-2-06611-8

LUTHERAN DAY CARE, a non-profit corporation,
Petitioner/Plaintiff,

vs.

SNOHOMISH COUNTY; THE SNOHOMISH COUNTY COUNCIL; and THE SNOHOMISH COUNTY HEARING EXAMINER,
Respondents/Defendants.

FILED

Dec 22 9:30 AM '89

KAY D. ANDERSON
COUNTY CLERK
SNOHOMISH CO. WASH.

ORDER FOR DEFENDANTS ON MOTION FOR SUMMARY JUDGMENT

I. HEARING

This matter came before the above-entitled court on September 25, 1989 upon cross-motions for summary judgment regarding damage claims brought by plaintiff Lutheran Day Care, a non-profit corporation, against defendants Snohomish County; the Snohomish County Council; and the Snohomish County Hearing Examiner. Plaintiff filed an Application for Writ/Complaint for Dam-

ages on December 31, 1986, stating as its First Cause of Action a writ of certiorari to review the decisions of the Snohomish County Council and Snohomish County Hearing Examiner under Conditional Use Permit File No. ZA8402028 which had denied plaintiff's application for a conditional use permit for the construction of a rest home in a single-family residential zone. Plaintiff stated as its Second Cause of Action a complaint for damages under Chapter 64.40 RCW based upon defendants' denial of the conditional use permit. Plaintiff filed an amended Complaint for Damages on March 23, 1988, stating as its Third Cause of Action the tort of intentional and improper interference with plaintiff's reasonable business expectancy and as its Fourth Cause of Action a violation of 42 U.S.C. § 1983, based upon defendants' denial of the conditional use permit upon two occasions.

On September 5, 1989, defendants Snohomish County, the Snohomish County Council, and the Snohomish County Hearing Examiner filed Defendants' Motion for Summary Judgment seeking dismissal with prejudice of plaintiff's Second, Third, and Fourth Causes of Action as to all three defendants. On the same day, plaintiff Lutheran Day Care filed its Motion for Partial Summary Judgment on the issue of defendants' liability under plaintiff's Second and Fourth Causes of Action. Lutheran Day Care was represented by and through its attorney, Gregory L. Bertram, and the defendants were represented by and through Deputy Prosecuting Attorney Carol J. Weibel. The court considered the records and files herein including:

(1) The complete return of writ filed herein under plaintiff's First Cause of Action consisting of all written documents and exhibits in conditional use permit file No. ZA8402028 and the transcription of all public hearings conducted concerning that permit file number.

(2) A supplemental record of written documents and exhibits in file No. ZA860162 relating to a variance granted

relating to property abutting the property subject to the present action.

(3) A memorandum decision issued in the writ case on September 7, 1988 remanding the decision of the hearing examiner denying the petitioner's conditional use permit to the hearing examiner for entry of detailed findings of fact.

(4) Supplemental findings of facts and conclusions issued by the hearing examiner on November 2, 1988 on permit file No. ZA8402028.

(5) All legal memoranda submitted by counsel for plaintiff and defendants in the writ case under plaintiff's First Cause of Action.

(6) Order on Writ of Certiorari, entered on February 9, 1989, under plaintiff's First Cause of Action, remanding to the Snohomish County Council for the issuance of the conditional use permit.

(7) The Order of the Hearing Examiner Issuing a Conditional Use Permit as Directed by the Superior Court in file No. ZA8402028 dated March 15, 1989.

(8) The memoranda including all attachments thereto submitted by counsel in the damage actions on the cross-motions of summary judgment consisting of:

(a) Memorandum in Support of Defendant's Motion for Summary Judgment dated September 5, 1989.

(b) Memorandum in Support of Plaintiff's Motion for Partial Summary Judgment dated September 5, 1989.

(c) Defendants' Memorandum in Opposition to Plaintiff's Motion for Summary Judgment dated September 15, 1989.

(d) Plaintiff's Reply memorandum to Defendants' Motion for Summary Judgment dated September 15, 1989.

(e) Defendants' Reply to "Plaintiff's Reply Memorandum to Defendants' Motion for Summary Judgment" dated September 20, 1989.

(f) Plaintiff's Reply Memorandum in Support of its Motion for Summary Judgment dated September 20, 1989.

After hearing oral argument on September 25, 1989, the court took the matter under advisement and issued a Memorandum Decision on Motion for Summary Judgment on November 22, 1989. By this reference, the court's Memorandum Decision is incorporated herein.

II. FINDINGS

1. No Issue. There is no genuine issue as to any material fact in plaintiff's Second, Third, and Fourth Causes of Action.

2. Judgment. Defendants Snohomish County, the Snohomish County Council, and the Snohomish County Hearing Examiner are entitled to judgment as a matter of law.

III. ORDER

NOW, THEREFORE, the court hereby enters the following order:

1. Plaintiff's Second Cause of Action alleging a claim for damages under Chapter 64.40 RCW is dismissed with prejudice as to all three defendants.

2. Plaintiff's Third Cause of Action alleging a claim for damages under the tort of intentional and improper interference with plaintiff's reasonable business expectancy is dismissed with prejudice as to all three defendants.

3. Plaintiff's Fourth Cause of Action alleging a claim for damages under the federal civil rights act, 42 U.S.C. § 1983, is dismissed with prejudice as to all three defendants.

DONE IN OPEN COURT this 22nd day of December, 1989.

/s/ Joseph A. Thibodeau
JOSEPH A. THIBODEAU

Presented by:

SETH R. DAWSON
Prosecuting Attorney

/s/ Carol J. Weibel
CAROL J. WEIBEL
Deputy Prosecuting Attorney
Attorney for Defendants

Copy Received; Notice of
Presentation Waived:

/s/ telephone 12-22-89, CJW
GREGORY L. BERTRAM
Attorney for Plaintiff

APPENDIX E

IN THE
SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

NO. 86-2-06611-8

LUTHERAN DAY CARE,
Petitioner/Plaintiff,

vs

SNOHOMISH COUNTY; THE SNOHOMISH COUNTY COUNCIL; and THE SNOHOMISH COUNTY HEARING EXAMINER,
Respondents/Defendants.

FILED

Nov 22 3:56 PM '89

KAY D. ANDERSON
COUNTY CLERK
SNOHOMISH CO. WASH.

MEMORANDUM DECISION ON MOTION FOR SUMMARY JUDGMENT

I. STATEMENT OF CASE

This matter comes before the Court upon each side's Motion for Summary Judgment.

The facts are essentially undisputed. Lutheran Day Care, on February 8, 1984, applied for a Conditional Use Permit (C.U.P.) to construct a 77 unit retirement center in a single-family residence zone. The Snohomish County De-

partment of Planning and County Development made a staff recommendation that the permit be granted, with conditions that are not relevant to the matter at hand. Despite the recommendation, on June 3, 1985, the Snohomish County Hearing Examiner denied the project because it did not qualify as a "rest home." The denial was affirmed by the Snohomish County Council. On July 1, 1986, this Court held that the project constituted a "rest home" and, therefore, was an allowable use under Snohomish County Code (SCC) 18.08.540. This decision was affirmed by the Court of Appeals.

On November 24, 1986, the Hearing Examiner again denied the permit, and the said denial was affirmed by the County Council. Based upon the Hearing Examiner's findings of fact, on February 9, 1989, the Superior Court issued an Order of Writ of Certiorari, wherein the Court ordered as follows:

> (1) Remanded the matter to the Snohomish County Council for immediate issuance of the C.U.P.;
>
> (2) Awarded judgment to Petitioner for statutory attorneys' fees and costs.
>
> Further, the Order stated that:
>
> (The) findings and conclusions by the Hearing Examiner constitute wilful and unreasonable action without consideration and in disregard of the relevant facts and circumstances. The denial of the Conditional Use Permit on (the findings given by the Hearing Examiner) is arbitrary, capricious and unlawful.

The County Council further remanded to the Hearing Examiner for immediate issuance of the C.U.P. On March 15, 1989, the Hearing Examiner issued the C.U.P. Thereafter, this civil action was commenced seeking damages

under RCW 64.40 common law tort claims and federal civil rights action under 42 USC § 1983.

II. STATEMENT OF THE ISSUE

Whether the actions of defendants were quasi-judicial and, therefore, entitled to immunity from State tort law claims, including claims under RCW 64.40, and federal civil rights claims under 42 U.S.C. § 1983.

III. DISCUSSION AND DECISION

The County argues that summary judgment should be granted as a matter of law on the ground that the actions of the Hearing Examiner were quasi-judicial in nature and therefore immune from liability. Summary judgment is proper only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). The court must consider all the facts submitted and all reasonable inferences from the facts in the light most favorable to the nonmoving party. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

The proceedings before a hearing examiner and a City Council which concern interpretation of the local zoning code have been held to be "clearly quasi-judicial in nature." *Grader v. City of Lynnwood*, 53 Wn.App. 431, 442, 767 P.2d 952 (1989). "That is, their work was 'functionally comparable to that of a judge.' " *Id.*, *quoting Jensen v. Torr*, 44 Wn.App. 207, 213, 721 P.2d 992 (1985), *rev. denied*, 105 Wn.2d 1004 (1986) (other citation omitted). In such a case, "the City (which was the agency making the final decision) could not be held liable in tort and the trial court properly dismissed the State law tort claims." *Grader*, at 442.

The facts of *Grader* are similar to the case at bar. In *Grader*, the City of Lynnwood interpreted its local zoning ordinance. *Id.*, at 434. The City's interpretation was affirmed by the hearing examiner and the City Council. *Id.*, at 435. However, Plaintiff Grader prevailed in Superior Court; the Appellate Court affirmed. *Id.* During the pendency of the City's appeal, Plaintiff Grader filed an action for damages against the City. *Id.* Of the several claims, the trial court dismissed the State law tort claims "on the grounds of quasi-judicial immunity on the public duty doctrine." *Id.*, at 436. The trial court did not dismiss plaintiff's federal tort law claim under 42 U.S.C. § 1983. At trial, the jury "returned a verdict of $1.65 million in favor of Grader" on the 42 U.S.C. § 1983 claims. *Id.*, which was reversed by the Appellate Court. *See Id.*, at 442-443.

In the instant case, the local government agencies interpreted their local zoning ordinance. The interpretation was overruled by the Superior and Appellate Courts. Under such circcumstances, the tort claims of Lutheran Day Care must be dismissed for the same reason expressed in *Grader*: The actions of the hearing examiner and the Snohomish County Council are quasi-judicial and, therefore, immune from tort claims.

Plaintiff, however, argues that the common law quasi-judicial immunity is overriden by RCW Chapter 64.40, which reads in pertinent part as follows:

> Owners of a property interest who have filed an application for a permit have an action for damages to obtain relief from acts of an agency which are arbitrary, capricious, unlawful, or exceed lawful authority, . . . : *Provided*, that the action is unlawful or in excess of lawful authority only if the final decision of the agency was made with knowledge of its unlawfulness or that it was in excess of lawful authority, or it should reasonably have been known to have been unlawful or in excess of lawful authority.

RCW 64.40.020(1).

"In construing a statute, (the court's) paramount duty is to ascertain and give effect to the intent of the Legislature." *WPPSS v. General Electric*, 113 Wn.2d 288, 292, ___ P.2d ___ (1989) (other citation omitted). "If a statute is subject to more than one reasonable interpretation, (the court) must adopt the interpretation most consistent with the intent of the Legislature as derived from the language of the act as a whole and the previous constructions placed upon the statute by this court." *Id.* As to the statute, RCW Chapter 64.40., in the case at hand, it is unclear whether the legislature intended to override the common law regarding quasi-judicial immunity. The rule is that "statutes must be construed with reference to the common law, for it must not be presumed that the legislature intended to make any innovation on the common law without clearly manifesting such intent." *Green Mountain School District No. 103 v. R.S. Durkee*, 56 Wn.2d 154, 161, 351 P.2d 525 (1960). Since RCW 64.40 does not manifest a clear intent to override the common law regarding quasi-judicial immunity, the law requires the court to hold that the common law must control at the expense of the Legislative Enactment.

Plaintiff argues that the actions of the local government agencies violated RCW 64.40.020(1) because "the denial (by the local government agencies, was ruled as being) arbitrary, capricious and unlawful." *See* February 9, 1989, Order of Snohomish County Superior Court, page 3. Further, the actions of the hearing examiner were held to "constitute wilful and unreasonable action without consideration and in disregard of the relevant facts and circumstances." *Id.*

In any event, plaintiff has not demonstrated that the defendants' actions were made with knowledge that the actions were unlawful or were in excess of lawful authority, or that the defendants should reasonably have known

that the actions were unlawful or in excess of lawful authority, as required by RCW 64.40.020(1). As a result, plaintiff has failed, as a matter of law, to establish a cause of action under Chapter RCW 64.40.

Finally, plaintiff argues that the February 9, 1989, order establishes a claim under 42 U.S.C. § 1983.[1] Plaintiff has not shown that the denial was made with "purposeful discrimination or at least an allegation that the misdeeds were knowing or reckless." *See Grader*, at 438 (other citations omitted). Without such a showing, plaintiff has failed to establish a cause of action under 42 U.S.C. § 1983.

In conclusion, plaintiff's federal civil right and State law tort claims are dismissed with prejudice as a matter of law. Summary judgment is granted in favor of defendants.

DATED THIS 22nd day of November, 1989.

/s/ Joseph A. Thibodeau
JOSEPH A. THIBODEAU

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[1] Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State of Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action of law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983 (1979)

APPENDIX F

SUPERIOR COURT OF WASHINGTON FOR SNOHOMISH COUNTY

NO. 86-2-06611-8

LUTHERAN DAY-CARE, a non-profit corporation,
Petitioner/Plaintiff,

vs.

SNOHOMISH COUNTY; THE SNOHOMISH COUNTY COUNCIL; and THE SNOHOMISH COUNTY HEARING EXAMINER,
Respondents/Defendants.

FILED

'89 FEB 9 AM 10:47

KAY D. ANDERSON
COUNTY CLERK
SNOHOMISH CO. WASH.

ORDER ON WRIT OF CERTIORARI

This matter came before the above-entitled court on July 29, 1988 upon a Writ of Certiorari challenging the decision of the Snohomish County Hearing Examiner, as affirmed by the Snohomish County Council, which denied Petitioner a Conditional Use Permit for the construction of a rest home on property located at 1415 - 164th Street S.W., Lynnwood, Washington. The Petitioner was represented by and through its attorney James H. Allendoerfer, and the Respondents were represented by and through Deputy Prosecuting Attorney Carol J. Weibel. The Court consid-

ered a transcript of the records and the proceedings in this case consisting of the following:

1. All written documents and exhibits in Conditional Use Permit File No. ZA 8402028, including the decision of the Hearing Examiner dated November 24, 1986 and the decision of the Snohomish County Council dated December 24, 1986.

2. A transcription of all testimony and proceedings which occurred at the public hearings before the Hearing Examiner on June 18, 1985 and November 4, 1986, and before the Snohomish County Council on August 7, 1985.

3. A supplemental record of written documents and exhibits in File No. ZA 860162 relating to a variance issued to the Atlantic Richfield Company for property abutting the subject property.

On September 7, 1988 this court issued a Memorandum Decision stating, in part, as follows:

> There is no clear factual basis, set forth in the record, for the conclusions upon which the Hearing Examiner's decision rests, nor is there reference to standards, if any, that support the Examiner's decision. Therefore, the decision of the Hearing Examiner denying the Petitioner's Conditional Use Permit is remanded for further proceedings, to wit: the entry of detailed findings of fact setting forth specific references to the record that support those findings which are the basis for the Examiner's decision and further; that any standards considered in the conclusions that are reached be clearly defined.
>
> This court will maintain jurisdiction for the purpose of resolving any further issues that may arise.

On November 2, 1988 the Hearing Examiner issued an Order providing Supplemental Findings of Fact and Conclusions on ZA 8402028. On January 6, 1989 the court

reviewed the files and records herein and considered the argument of counsel; on Februaary 3, 1989 the court considered further argument of counsel including proposed drafts of a court order to be entered herein.

The court hereby finds that the Hearing Examiner's Order, even as supplemented, is not supported by the evidence in the record and is not based upon ascertainable standards. The three reasons stated by the Hearing Examiner for denying the Conditional Use Permit, are as follows:

> 1. The internal circulation system on the site is not effective and would not serve the public use and interest. The circulation plan is simply not desirable as access to a major activity on the subject property;
>
> 2. The bulk of the structure and its proximity to property lines would be incompatible with single-family residential uses that might now exist or may occur on abutting parcels; and
>
> 3. The site is not large enough for the proposed rest home when the same site already has a church and day care center. It is simply too intense a use for the subject property. Moreoever, the number of occupants in the proposed rest home would result in a residential density which would be substantially incompatible with the zoning classification of the subject property and with the present and permitted uses on abutting residential properties.

These findings and conclusions by the Hearing Examiner constitute wilful and unreasonable action without consideration and in disregard of the relevant facts and circumstances. The denial of the Conditional Use Permit on these grounds is arbitrary, capricious and unlawful. This Court finds that the internal circulation system, the bulk and dimensional elements of the project, the site plan, and the density of development, as proposed by the Petitioner, are

reasonable and acceptable based upon the evidence in the record and upon the ascertainable standards of Snohomish County.

NOW, THEREFORE, the Court hereby enters the following Order:

1. This case is remanded to the Snohomish County Council for the immediate issuance of a Conditional Use Permit for the rest home project as proposed by the Petitioner. Reasonable conditions of a technical nature may be imposed on the project provided that the same are based upon evidence in the record and upon ascertainable standards. No conditions may be imposed which would be inconsistent with the findings of this Court.

2. This Court shall retain jurisdiction over this matter for the purpose of resolving any further issues which may arise.

3. The Petitioner is hereby awarded judgment against Snohomish County for statutory attorney's fees and taxable costs as stated in the Petitioner's Cost Bill dated September 21, 1988.

DONE IN OPEN COURT this 9th day of February, 1989.

/s/ Daniel T. Kershner
DANIEL T. KERSHNER, Judge

Presented by:

/s/ James H. Allendoerfer
JAMES H. ALLENDOERFER
Attorney for Petitioner

Copy Received; Notice of
Presentation Waived:

/s/ Carol J. Weibel 2-9-89
CAROL J. WEIBEL
Deputy Prosecuting Attorney

APPENDIX G

[seal]
SNOHOMISH COUNTY
Hearing Examiner's Office

John E. Galt
Hearing Examiner

Peter T. Donahue
Deputy

M/S #405
3000 Rockefeller Ave.
Everett, WA 98201
(206) 388-3538

CERTIFICATION OF THE:

**ORDER OF THE HEARING EXAMINER
PROVIDING SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS
AS DIRECTED BY THE SUPERIOR COURT
ENTERED NOVEMBER 2, 1988**

APPLICANT NAME: LUTHERAN DAY CARE

CASE NO.: ZA 8402028

STATE OF WASHINGTON)
) ss
COUNTY OF SNOHOMISH)

I, Mary Kurke, Clerk of the Hearing Examiner for the Snohomish County Hearing Examiner, certify under penalty of perjury under the laws of the State of Washington that the attached document is a true and correct copy of the original Order of the Hearing Examiner dated November 2, 1988 under county file number ZA 8402028 and

now on file in the Hearing Examiner's Office.

/s/ Mary Kurke
Signed at Everett, Washington on
October 15, 1992

Office of the
Hearing Examiner
Snohomish County, Washington

CASE NO.: ZA 8402028
Lutheran Day Care

STATE OF WASHINGTON)
)
COUNTY OF SNOHOMISH)

ORDER OF THE HEARING EXAMINER PROVIDING SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS AS DIRECTED BY THE SUPERIOR COURT

WHEREAS, on December 24, 1986 the Snohomish County Council did deny a conditional use permit application under file number ZA 8402028 which had been filed by Lutheran Day Care (a non-profit corporation, hereinafter referred to as "the applicant") for a senior citizen rest home (Exhibit 117); and

WHEREAS, the applicant appealed said denial under a Writ of Certiorari to the Superior Court in and for Snohomish County under court cause number 86-2-06611-8; and

WHEREAS, on September 7, 1988 a Memorandum Decision was issued by said Court holding that:

> "it appears that the Hearing Examiner's decision was predicated on the following three conclusions:
>
> 1. That the circulation system is not effective, would not serve the public use and interest, and is simply not desirable as access to a major activity on the subject property.
>
> 2. The bulk and proximity of the structure to a residentially zoned area makes it incompatible with

the single family residential uses that now exist or may occur on abutting parcels.

3. The 4.89 acre site is not large enough to place a rest home when the same site already has a church and day care center. It is simply too intense a use of the subject property.

. . .

"There is no clear factual basis, set forth in the record, for the conclusions upon which the Hearing Examiner's decision rests, nor is there reference to standards, if any, that support the Examiner's decision. Therefore the decision of the Hearing Examiner denying the petitioner's Conditional Use Permit is remanded for further proceedings, To Wit: the entry of detailed findings of fact setting forth specific references to the record that support those findings which are the basis for the Examiner's decision and further; that any standards considered in the conclusions that are reached be clearly defined.

"This court will maintain jurisdiction for the purpose of resolving any further issues that may arise."; and

WHEREAS, said Court has thus asked the Examiner to supplement his Findings and Conclusions based upon the record made in prior hearings but has not asked that the Examiner reopen the matter for further testimony nor redo the entirety of the decision; and

WHEREAS, the Examiner has therefore concluded that the Court's directive can be fulfilled by the issuance of supplemental Findings and Conclusions based upon the record.

NOW, THEREFORE, the Examiner makes and enters his supplemental:

FINDINGS OF FACT

1. The applicant is seeking to construct a 77 dwelling unit rest home on a "cross" or "+" shaped parcel situated on the north side of 164th Street SW between Motor Place and 13th Avenue W. (The initial application sought approval for 80 dwelling units (Exhibits 2 and 3) but was subsequently revised downward to 77 units (Exhibit 5), upward to 122 units (Exhibits 23 and 27) and back down to 77 where it remained throughout the rest of the proceedings (Exhibits 52 et. seq.).)

2. The conditional use permit application was initially filed on February 8, 1984 (Exhibit 2). This Examiner has issued three decisions regarding the instant application:

   A. On February 22, 1985 the application was returned to the applicant "for compliance with Title 26B and reevaluation of SEPA Threshold Determination" (Exhibit 56). Said decision will be referred to hereinafter as "LDC 1".

   B. On July 3, 1985 the Examiner denied the application, primarily on the grounds that the proposed use was not permitted in the zone which is applicable to the subject property (Exhibit 71). The Examiner's second decision will be referred to hereinafter as "LDC 2". LDC 2 was appealed by the applicant to the County Council which sustained the Examiner's decision (Exhibits 72 and 85). The Council's action was appealed to Superior Court in and for Snohomish County under cause number 85-2-03274-6, which Court issued a judgement on July 1, 1986 ruling in relevant part that the applicant's proposal was a "rest home" as then defined by the Snohomish County Zoning Code. The application

was remanded to the Examiner for further hearing on the merits (Exhibit 87).

C. On November 24, 1986 the Examiner denied the application following the Court-ordered rehearing (Exhibit 116). Said decision will hereinafter be referred to as "LDC 3". LDC 3 was appealed to and sustained by the County Council on December 24, 1986 (Exhibit 117); LDC 3 was appealed to Superior Court under cause number 86-2-06611-8.

3. The Snohomish County Zoning Code was substantially restructured through the adoption by the County Council of an ordinance whose effective date was July 1, 1986. The Examiner has previously ruled in this case that the applicant has a vested right to consideration of its conditional use permit application under the pre-restructuring zoning code (LDC 3, Conclusion 2). That ruling was not challenged and has been followed by the parties in subsequent proceedings. All zoning code references herein will use the pre-restructuring code citations.

4. The applicant provided a legal description of the property which it wanted to have subject to the rest home conditional use permit as part of its original application (Exhibit 2). The applicant identified the property as being composed of four parcels which it labeled A through D. The application also stated that said four parcels contained a total of approximately 4.89 acres.

5. The applicant has never revised the legal description at any time during the pendency of these proceedings.

6. The county has used the legal description provided by the applicant in all public hearing notices. (The record contains copies of hearing notices mailed on April 30, 1984, December 5, 1984 and June 3, 1985 which do

not bear exhibit numbers. The record also contains Exhibits 94 and 96 which are subsequent hearing notices. All five of the notices contain identically the same legal description.)

7. The applicant consistently stated that the property which was to be subject to and benefit from the rest home conditional use permit contained 4.89 acres (Exhibits 2, 3, 5, 11, 23, 27, 52, 84 and 85) until November 4, 1986 (the date of the Examiner's third and final hearing) at which time the first reference to a larger site occurred. Exhibit 104 was entered into the record on November 4, 1986. Exhibit 104 states that the property contains 5.34 acres. (Exhibit 102 was also entered into the record on that same date but it does not give any indication of the area of the property.)

8. The Planning Division (PD) of the Department of Planning and Community Development prepared a map showing the boundaries of the property as legally described by the applicant in Exhibit 2. Said map was entered into the record and became Exhibit 57. Exhibit 57 shows the pattern of lot subdivisions and zoning designations in the vicinity of the subject property. Attachment 1 hereto is a simplified copy of Exhibit 57 prepared by the Examiner for reference purposes.

9. Exhibits 3, 5, 23, 27, 52, 84, 85A, 102 and 104 are project plans of one type or another containing property dimensions. The dimensions on all of said exhibits are consistent with the following exceptions (Attachment 2 hereto is a line drawing of the property with dimensions shown and particular property lines denoted by letter. The following discussion is referenced to Attachment 2.):

   A. Exhibit 3 indicates that line A is 75 +/- feet whereas all other exhibits indicate that the line is 100 feet.

B. Exhibit 3 indicates that line B is 250 +/- feet. Exhibits 102 and 104 indicate that the line is 214 feet. The length of that line is either not shown or not given on the remainder of the site plans.

C. The length of lines C, D and E are shown only on Exhibits 102 and 104. There is no discrepancy in the stated length of said lines on those exhibits.

D. As can be seen from either Exhibit 57, Attachment 1 hereto, or any of the site plans, the property is basically composed of rectangles although Motor Place has a slight slant towards the east which accounts for the difference in length between lines D and E. In a rectangularly shaped parcel the sum of the east-west lines on the top of the shape should equal the sum of the east-west lines on the bottom. A similar equality should exist between the north-south lines on the west and the north-south lines on the east. The east-west lines do both add up to a total width of 660 feet. However, the sum of the easterly north-south property lines is seven feet greater than the sum of the westerly north-south property lines (457 v. 450 feet).

It is possible to independently calculate the area of the property from the information on the above referenced exhibits. To do so, the Examiner has discarded those dimensions on Exhibit 3 which differ from the rest of the exhibits, has averaged lines D and E for ease of calculation, has rounded the dimensions off in standard fashion and has made two separate calculations, one assuming the longer north-south dimension, the other assuming the shorter north-south total dimension. The approximate area of the site described by the legal description in Exhibit 2 and shown on all site plans submitted prior to November 4, 1986 is either 176,944 square feet or 174,597 square feet,

either of which equates to approximately 4.06 acres. The applicant makes reference in its Court appeal documents to an additional parcel adjacent to the south side of the east arm of the cross. Said parcel was never included in the legal description on the application nor on any of the advertising. Exhibits 102 and 104 indicate that said parcel has dimensions of 87 feet by 214 feet which would have it contain 18,618 square feet or 0.42 acres. However, the Examiner takes official notice that said parcel was involved in county application ZA 8507179, an application filed by the instant applicant (or an associated non-profit entity) in which the legal description is given as 78.47 feet by 214 feet (see footnote, bottom of this page). Assuming that the written legal description is more correct than the architect's drawings, the area of the "additional" property would be 16,692 square feet or 0.38 acres.

10. As can be seen from either Exhibit 57 or Attachment 1 hereto the entirety of the subject property (and also the "additional" property) is zoned Residential 9,600 (R-9,600) and has been so zoned at all times material to the instant application. The south portion of the south arm of the cross is bordered on the west by Freeway Service (FS) zoned property and on the east by Neighborhood Business (NB) zoned property. The FS zoning extends northerly from 164th Street SW for a distance of approximately 150 feet; the NB zon-

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Footnote: In ZA 8507179 Shepherd of the Lake Lutheran Church (dba Lutheran Daycare, Inc.) sought and received approval to expand the daycare operation onto the "additional" property described in the above text and to enlarge the daycare buildings on the east arm of the subject property. The approved expansion included 2,400 square feet of new classrooms (replacing three old buildings elsewhere on site which were to be destroyed), 1,600 square feet of new space in the main daycare building and covering 3,910 square feet of outdoor play area. The hearing was held before this Examiner on October 24, 1985; the request was approved November 1, 1985.

ing extends northerly for a nearly equal distance. All property north of the FS and NB zoned parcels lying between Motor Place and 13th Avenue W is zoned R-9,600. The R-9,600 zone is essentially a single family residential zone in which the minimum lot area is 9,600 square feet [SCC 18.20.040], the maximum building height is 25 feet [SCC 18.20.070], the maximum lot coverage by buildings is 35% [SCC 18.20.080] and the minimum setbacks are essentially 20 feet from public r/w, five feet from each side yard and five feet from the rear lot line [SCC 18.20.060 referencing SCC 18.18.060].

11. The applicant presently operates a church and day care/private school facility on the property which is the subject of the instant proceeding (the existing facilities are described in LDC 1, Finding 2 and LDC 2, Finding 2). As can be seen by either site inspection or referral to Exhibit 102 (a reduced and simplified copy of which is included as Attachment 3 hereto), the day care facility utilizes the entirety of the east arm of the subject property. The east arm contains approximately 27,392 square feet. The church and its associated parking occupy the east half and basically the south half of the west half of the southern arm of the property containing approximately 47,000 square feet. The church's custodian lives in a single family residence which occupies (except for an emergency access drive along the north edge) the entirety of the west arm of the property (Exhibit 14). The west arm contains approximately 11,000 square feet. The remaining area is that which would be available for the rest home and would contain between 89,200 and 91,552 square feet or between 2.05 and 2.10 acres (depending upon which north-south dimension is correct; see Finding 9D, above).

12. On July 22, 1985 (subsequent to the issuance of LDC 2 but prior to the hearing in LDC 3) the applicant filed for a conditional use permit to expand the day care/school facility. Said application was assigned file number ZA 8507179. That application identified a fifth parcel which was described as Parcel E lying adjacent to and south of the east arm of the subject property. That additional parcel has been previously discussed in Finding 9, above. The applicant received approval from this Examiner on November 1, 1985 of a "conditional use" permit to construct a 2,400 square foot classroom building on the additional property, to construct two 20' x 40' additions onto the existing day care building in the east arm of the subject property and to construct a 46' x 85' covered pole structure over part of the day care center's play area. The applicant has portrayed the fifth ("additional") parcel and the site plan approved under ZA 8507179 on Exhibit 102. It will be noted that the "additional" property, like that portion of the east arm which is part of the subject property, is to be entirely devoted to day care/private school purposes.

13. The applicant indicated during the November 4, 1986 hearing that the proposed rest home facilities had not changed significantly since the Examiner's earlier considerations of the application (sworn testimony of the applicant's architect, see hearing transcript, p. 21, lines 22-23 and p. 46, lines 8-21). The proposed facility was described in LDC 2, Finding 4 and the description was incorporated in LDC 3 by reference in Finding 5. In brief, the proposed rest home would contain 77 living units on three floors. Each floor would cover approximately 18,088 square feet for a total building floor area (excluding the underground parking) of 54,264 square feet. There would be 36, one bedroom, 650 square foot living units and 41, bachelor/studio, 490 square foot units. Both of the unit types would contain

full baths, individual hot water heaters, closet space, a wet bar with undercounter refrigerator and a deck/lanai. One or two kitchenettes would be located near the end of each floor with a communal laundry facility near the center of each floor. In addition, each floor would contain a common lounge. Office space for a nurse and an administrator would be located on the first floor. A separate 5,000 square foot single story activity building would be located to the south of the main structure and would be connected by a second story skybridge. The activity building would contain a 2,100 square foot dining room, an 800 square foot kitchen and a 2,100 square foot activity room. A sport court would be located on the roof of said building.

14. The site plan which was before the Examiner at the November 4, 1986 hearing was Exhibit 85A which had been submitted to the county on June 17, 1986 and received by the Examiner's Office on October 28, 1986. Exhibit 102 was not submitted as a site plan but was rather submitted on the day of the hearing as a drainage plan for the entirety of the applicant's facilities (sworn testimony of the applicant's architect, transcript of the November 4, 1986 hearing, p. 21, lines 1-5). According to Exhibit 85A, the main residential building would occupy the north arm of the cross shaped parcel. The main building would have a length of 272 feet or 81% of the total width of the north arm of the property. The structure would be located 30 feet from the north line, 30 feet from the east line and 34 feet from the west line of the north arm of the cross shaped parcel. The property slopes downward from the 13th Avenue W to Motor Place. Parking for 50 cars would be provided under the building. Entry to the underground parking would be from the west end of the property and would be at grade at that point. When viewed from the north, the building would appear to be between three and four stories in

height with the higher perception occurring on the west end where the at grade entry to the underground parking would occur. The zoning code establishes a 25 foot maximum building height for the R-9,600 zone [SCC 18.42.020, Bulk Matrix] which is measured "from the average elevation of the finished grade at the front of the building." [SCC 18.90.155] The applicant proposes to meet this standard by constructing a retaining wall off the southwest corner of the building and regrading the site to be level with the first floor across the entire south face of the building. The activity building would not be visible from the north because it is only one story in height and is located south of the three story residential building (Exhibit 52; Exhibit 52 is the only exhibit providing building elevations and interior floor plans).

15. Exhibit 102 contains dimensions which would appear to modify the size of the building and its setbacks from the north arm property lines. The exhibit indicates that the building would be reduced to 266 feet in length and that the setbacks from the east, north and west sides of the north arm would be each increased to 35 feet. It will be noted, however, that the given dimensions do not scale out properly on the site plan and that the building wouldn't fit in the area indicated if the dimensions were correct. For example, the given dimension of 266 feet still scales out to 272 feet, the stated 35 foot setback from the east property line actually scales to 30 feet and a 35 foot setback from the north property line coupled with a 68 foot north-south dimension of the building would not fit in the area shown.

16. The applicant has suggested in its Court appeal that the landscape area shown in the southwest corner of the central part of the cross (just west of the activity/support building) is a new addition which was over-

looked by the Examiner. Such is not the case since that landscaped area has been a part of every site plan submitted since Exhibit 84 in 1985 (see Exhibits 84 and 85A). Neither the location, the configuration nor the size of said area has changed in any submittal since Exhibit 84.

17. The day care facility's traffic circulation system approved under application ZA 8507179 is graphically shown on Exhibit 102. Basically a 25 foot wide two-way driveway is provided along the north edge of the east arm of the property. A north to south one-way drive with angled parking is to lie between the daycare buildings and 13th Avenue W. A two-way driveway occurs onto 13th Avenue W near the south line of the property. An east to west one-way driveway with angled parking would run along the south edge of the day care addition. All traffic using that driveway would end up in the church's parking and circulation area along the east edge of the center of the property and the south arm. The motorist would then either turn left to go south to 164th Street SW or north to come back out the northerly driveway past the day care facilities. The church itself presently has two driveways onto 164th Street SW. It is possible to go around the church to reach the east-west drive along the north edge of the day care site. The Department of Public Works (DPW) and the PD ask the Examiner to require the applicant to eliminate the easterly of the two present drives onto 164th Street SW and to move the westerly driveway east by approximately 25 feet in order to avoid conflict with the adjoining land use to the west (Exhibit 101 and transcript, p. 38, line 15 through p. 42, line 24). The DPW further recommended that all day care access be required to be limited to 13th Avenue W (Exhibit 62). The DPW did not evaluate the internal circulation beyond its direct effect upon proposed improvements to 164th Street

SW (ibid.). The applicant's agent opposed elimination of the easterly access onto 164th Street SW but indicated that such elimination was "one we might have to live with" (transcript, p. 48, lines 15-24). Assuming that the DPW and PD recommendation regarding access were to be included as conditions on the permit, the access to the rest home would have to occur through the day care property on the east arm of the site. One accessing the day care would drive westerly along the north edge of the day care building and the fenced outdoor play area for a distance of approximately 214 feet, would make a 90 degree turn to the left for a distance of approximately 20 feet and would then make a 90 degree turn to the right to reach the main entrance on the parking for the day care. One would continue on through the single aisle parking area to enter the underground parking from the west end of the building. No turnaround nor loading area are provided. An emergency vehicle only access extends westerly across the north edge of the west arm of the property to Motor Place. It would be possible to also enter the site through the south day care entrance off 13th Avenue W, travel westerly down the one-way driveway for 214 feet, make a 90 degree right turn and travel northerly for approximately 120 feet where one could then make a 90 degree left turn to enter the rest home parking area (see Exhibit 85A or 102).

18. A single story ARCO minimart occupies the FS zoned property adjacent to the south half of the south arm. A single family residence fronts on Motor Place between the minimart and the applicant's custodian's residence in the west arm of the property. A single family residence lies north of the custodian's residence along Motor place. A single family residence lies north of the east arm of the property on 13th Avenue W. The majority of the large parcels bordering the north

side of the north arm are presently undeveloped. An apparent nonconforming fourplex lies one lot removed to the north with access off Motor Place. A gas station occupies the corner at 13th Avenue W/164th Street SW (Examiner site inspection of May 14, 1984 as documented in the file).

CONCLUSIONS

1. A rest home is a listed conditional use for the R-9,600 zone subject to a minimum qualifying criterion that no building can be closer than 30 feet to the external boundaries of the property upon which it is to be constructed [SCC 18.20.030 referencing SCC 18.18.030(7)]. The applicant's proposed facility has been determined by the Courts to be a rest home as that term was defined in the zoning code under which this application is being considered. Therefore, the applicant's application is eligible for consideration.

2. A conditional use is defined as "a use listed among those classified in any given use zone but permitted to locate only after review by the Hearing Examiner and the granting of a conditional use permit *imposing such performance standards as will make the use compatible with other permitted uses in the same vicinity and zone and assure against imposing excessive demands upon public utilities.*" [SCC 18.08.190, emphasis added]. In the introduction to the list of conditional uses which can be considered for the R-9,600 zone, the old zoning code stated that "[b]ecause of their size or effect upon the surrounding property, the following uses of land will only be permitted upon issuance of a conditional use permit. The purpose of this section is to better protect the higher uses of land and assist the stabilization of property values, and to further the purposes set forth in Section 18.04.010." [SCC 18.18.030]

3. SCC 18.04.010 contains the statement of purpose for the entire zoning code. Said section indicates that the "purpose and intent of this [zoning code] is to provide the authority for, and the procedures to be followed, in guiding and regulating the physical development of Snohomish County through correlating both public and private projects and coordinating their execution with respect to all subject matters utilized in developing and servicing land, all to the end of assuring the highest standards of environment for living, the operation of commerce, industry, agriculture and recreation, and assuring maximum economies in order to conserve the highest degree of public health, safety, morals and welfare."

4. The Hearing Examiner has been delegated the authority and responsibility of hearing and deciding conditional use permit applications [SCC 18.88.040 which states that "the examiner *may* grant conditional use permits for such use and *under such circumstances* as set forth in [the zoning code]." emphasis added] It is widely acknowledged that the delegation of such authority to a hearing body such as a Hearing Examiner must be accompanied by the provision of some criteria or standards to be followed in the exercise of the discretion which is inherent in the delegated authority. R.M. Anderson in his *American Law of Zoning, 3rd Edition* (1986) speaks to this issue. Anderson states that a conditional use permit "may be granted upon whatever terms are imposed by the zoning ordinance." [Section 21.02] He also states that "adequate standards [need to be] provided to guide the discretion of the issuing authority" [Section 21.05] but that Courts traditionally "have not required that such standards be spelled out in great detail". [Section 21.09] It has also been said that a decisionmaker in such circumstances does not have "untrammeled discretion" at his disposal [82 Am Jur 2d, 283]. The question of adequacy

of standards has arisen in Washington State appellant court decisions. For example, in *Pentagram Corp. v. Seattle* [28 Wn. App. 219, 622 P. 2d 892 (1981)], the Court of Appeals indicated that "[a]dministrative bodies must in most instances be guided by adequate standards to ensure against arbitrary and capricious action. However, the absence of specific standards is permissible if the subject matter will not admit to more specific standards." [at 226, citations omitted] Another example is *Wenatchee v. Boundary Review Board* [39 Wn. App. 249, 252-254 (1984)] where the court found the non-specific standards of RCW 36.93.170 and .180 adequate to guide a Boundary Review Board in making a decision on an annexation proposal.

5. The sections of the county zoning code that have been quoted in Conclusions 2 and 3, above, provide general review standards for conditional use permits. A more detailed recitation of the issues with which an Examiner can be concerned and of the nature of conditions which an Examiner can impose is set forth at SCC 18.88.060 which reads in its entirety as follows:

"When considering an application for a conditional use permit, the examiner shall consider the applicable standards, criteria and policies established by this title as they pertain to the proposed use and may impose specific conditions precedent to establishing the use. The conditions may:

1. Increase requirements in the standards, criteria or policies established by this title;

2. Stipulate the exact location as a means of minimizing hazards to life, limb, property damage, erosion, landslides or traffic;

3. Require structural features or equipment essential to serve the same purpose set forth in (2) above;

4. Impose conditions similar to those set forth in items (2) and (3) above as deemed necessary to establish parity with uses permitted in the same zone in their freedom from nuisance generating features in matters of noise, odors, air pollution, wastes, vibration, traffic, physical hazards, and similar matters; provided, the hearing examiner may not, in connection with action on a conditional use permit, reduce the requirements specified by this title as pertaining to any use nor otherwise reduce the requirements of this title in matters for which a variance is the remedy provided;

5. Assure the degree of compatibility with the purpose of this title shall be maintained with respect to the particular use on the particular site and in consideration of other existing and potential uses, within the general area in which the use is proposed to be located;

6. Recognize and compensate for variations and degree of technological processes and equipment as related to the factors of noise, smoke, dust, fumes, vibration, odors, and hazard or public need;

7. Require the posting of construction and maintenance bonds or other security sufficient to secure to the county the estimated cost of construction and/or installation and maintenance of required improvements."

6. The Examiner takes official notice that the criteria and standards of SCC 18.88.060 have existed essentially unchanged since January 1, 1966 and have been consistently utilized in evaluating and applying con-

ditions to conditional use permits first by the County's Board of Adjustment (from 1966 through 1980) then by the County Zoning Adjustor (from 1972 through 1980) and finally by the Hearing Examiner (from 1978 to the present).

7. In summary, the Examiner is required to consider the matters set out in SCC 18.88.060 as they relate to the purposes of a conditional use permit as defined and as indicated in SCC 18.18.030, and further so as to fulfill the general purpose and intent of the county zoning code set forth in SCC 18.04.010. Other than the minimum requirement that no rest home building can be located closer than 30 feet to any exterior property line there are no unique, specific, precise minimum standards established for rest homes. The reality is that the tremendous variation in the nature of those activities regulated by the conditional use permit process and even of various applications for the same use would render it virtually impossible for the county's legislative officials to develop precise standards that would appropriately work in each and every case to reach the objective of ensuring compatibility with permitted uses. Like the standards that the Court found acceptable in *Pentagram* and *Wenatchee* (*supra*), the county zoning code's standards lay out general parameters within which the finder of fact must exercise reasonable judgement.

8. The Examiner has consistently indicated over the years that compatibility does not mean sameness. Compatibility does mean that the conditional use should be so designed and regulated that it would not have an adverse effect upon "uses permitted in the same zone".

9. If compatibility cannot be found, then the Examiner has the right to deny the conditional use permit application. First, the discretionary right to approve such

a permit ("the Examiner may grant") implies the discretionary right to deny [*Stegriy v. Board of Appeals*, 39 Wn. App. 346, 353 (1984)]. Secondly, the Hearing Examiner's enabling statute expressly provides that the Examiner may deny applications [SCC 2.02.150(2)].

10. The key compatibility issues in the instant case are those associated with present and future land uses adjacent to the north arm of the subject property. There are two reasons for this focus of concern. First, the main proposed building will be essentially located wholly within the north arm of the property. It is the relationship of that building to the adjoining properties to the west, north and east which is the most critical. Were the building being constructed on the south portion of the property, then most likely its compatibility with the adjoining minimart and gas station would be of greater concern than compatibility with the residentially zoned property to the north. Second, the land which surrounds the north arm where the new building will be built is zoned for single family residential uses (as is the subject property itself) whereas the land adjoining at least the southern portion of the south arm of the property is zoned commercially. If the proposed building were to be located on the south portion of the property, one would be evaluating an intense use adjacent to other intense uses and the question of compatibility would be entirely different than in the present case where one is evaluating an intense use adjacent to low intensity uses and zoning.

11. In the conclusions that follow, the Examiner will elaborate upon the three bases for the denial in the reverse order to that in which they were listed by the Court in its memorandum decision.

12. The first issue to be discussed is the question of the adequacy of the site for the intensity of the use. It

undoubtedly could have been stated as a Finding of Fact that any and all restrictions and/or any and all benefits of a conditional use permit could apply only to those properties which had been identified by the applicant as being part of the application and for which legal notice of the application had been given. If an applicant happens to own adjacent land, the conditional use permit cannot be inferred to provide benefits or restrictions to that adjacent land if the land has never been identified as being part of the application.

13. In the instant case, the conditional use application for the rest home has from the date of its first submittal to the county identified only Parcels A-D as being part of the application. The application never provided a legal description for any additional properties and the hearing notices never identified any other property as being under consideration. Only the property outlined in blue on Exhibit 57 (highlighted by the heavy outline on Attachment 1) would thus be subject to and benefit from a conditional use permit if such were to be approved.

14. The applicant's statements regarding the size of its property have been wrong since the beginning. The Examiner, prior to this remand, had accepted the applicant's statements of area at face value: LDC 1, LDC 2 and LDC 3 all stated that the property contained 4.89 acres. Upon further scrutiny of the existing evidence, however, it has been shown in the Findings, above, that at best the property which would be subject to this application contains approximately 4.1 acres. The preponderance of the evidence clearly shows that the property which would be subject to and benefit from the permit does not contain anywhere near 5.5 acres of land as has been alleged by the applicant during the present Court proceedings. (Even if one were to somehow conclude that the additional day care

parcel should be considered part of the instant application even though it has never been legally advertised as such, the fact would still remain that the site would contain only approximately 4.5 and not 5.5 acres.)

15. The west arm of the property contains 11,000 square feet and is utilized as the residence for the applicant's custodian. That 11,000 square feet is not effectively a part of the rest home facility; even a cursory glance at Exhibit 85A indicates that the applicant obviously agreed since the entirety of that parcel is not even shown on said exhibit.

16. The east arm of the site contains 27,392 square feet and is totally devoted to the applicant's day care/school facility. (The additional parcel containing 16,692 square feet is also totally devoted to the school facility.) As in the case of the custodian's residence, review of Exhibit 85A indicates that the applicant itself does not consider that property to be part of the day care facility because it is not shown either.

17. Approximately 47,000 square feet of the south arm and the central portion of the cross shaped property are occupied by the church and its parking lot. The site plan indicates that the church parking lot would be entirely separate from the rest home facility. If the recommendations of the DPW and the PD were followed, the separation between the two would be made even stronger by the elimination of the easterly driveway on 164th Street SW. That property is basically not available to the rest home.

18. What is left is the center and the north arm of the cross shaped property. That portion of the site contains between 89,200 and 91,552 or between 2.05 and 2.10 acres (with the difference attributable to the seven foot difference in north-south dimensions described in

detail in Finding 9, above). It is worth noting in this regard that at one point in the early days of processing this application the applicant stated that it was going to segregate three acres of the total ownership into a separate legal entity for the rest home (Exhibit 25). Thus even the applicant has recognized that the entirety of its ownership is not realistically an effective part of the rest home project.

19. The applicant used lot coverage standards to argue before the court that the intensity of the proposal was not excessive. Lot coverage is not the best indicator of intensity of use in a residential zone. A very large and a modest single family residence would each house only one family, both of which might well have identically the same number of family members, but the former might cover a greater percentage of its lot. A far better indicator is the number of families on the lot. This indicator is referred to as the density of development.

20. A dwelling unit is defined by the zoning code as "one or more rooms in a dwelling designed for occupancy by one family for living or sleeping purposes and having *not more than* one kitchen." [SCC 18.08.230, emphasis added] The 77 units in the proposed retirement home would each constitute a dwelling unit under zoning code definitions. The residents will be ambulatory couples and singles. The most dwelling units that one can put on a piece of property zoned R-9,600 as a permitted use would be approximately four per acre (43,560 divided by 9,600 = 4.54). What this applicant is effectively seeking to do is put 77 dwelling units on slightly over two acres of land. The net density that would result would be approximately 36.7 dwelling units per acre. Even if one were to count the entirety of the applicant's property, ignoring the fact that the west arm of the property is occupied by the

custodian's residence, that the east arm is occupied by the day care center and that most of the south arm is occupied by the church, one would find that the density would be between 17.2 and 19 dwelling units per acre (without and with the additional day care parcel, respectively). No matter how one looks at it, the density which this applicant is seeking to place on the property is effectively between five and nine times that allowed by the zoning code for the adjacent R-9,600 zoned properties. That radical density in a building which will be shown in succeeding conclusions to be too close to the property line cannot be said to be compatible with R-9,600 permitted uses and activities.

21. The second issue is concern regarding the bulk of the building. As has been indicated, the rest home will be built almost wholly within the north arm of the property. The north arm has an east-west dimension of 336 feet. The long axis of the building runs parallel to that dimension. The building will be either 266 or 272 feet long (depending on whether one believes Exhibit 85A or Exhibit 102). In either case, the building will extend 79-81% of the perceived effective width of the property. The full 660 foot width of the property is not visually present to any property owner lying to the north because of the fact that a single family residence is located north of the west arm and another single family residence is located north of the east arm. From the north, one perceives a single family residence, then the applicant's property and then another single family residence between Motor Place and 13th Avenue W.

22. The proposed building will be a solid three-story building which will actually appear to be higher than three-stories when viewed from the north because of the artificial regrading of the property on the south side of the building in order to make the building meet

zoning code height limitations. When viewed from the north, the building will more typically appear to be 3 1/2 to four-stories high (as shown clearly by the elevation drawings in Exhibit 52). When viewed from the undeveloped, single family zoned properties abutting on the north, one would see simply a massive wall of brick and windows looking down onto the adjoining residential property. In this Examiner's professional opinion the mass of the proposed building in close proximity to the property lines, surrounded on three sides by single family residential lots or developable land, cannot be said to be assuring an appropriate "degree of compatibility".

23. As indicated in the findings above, the increased setbacks that are shown on Exhibit 102 (which the Examiner still does not recognize as an official site plan) do not work simply because all the applicant has done is change the numbers without changing the drawing. The dimensions given won't fit. Even with a 35 foot setback from the west, north and east property lines of the north arm, the building would hang as a massive shadow over the adjoining properties in a fashion that single family residences would never do. The building's mass is not compatible with existing and potential single family residential development of adjoining properties given its proposed location.

24. The third issue was a concern regarding the adequacy of the interior circulation system. No staff agency ever reviewed the adequacy of the interior circulation plan according to the evidence and testimony in the record. The Examiner takes official notice that the DPW's management historically has taken the position that because the DPW is charged with constructing and maintaining public roads it should not review most issues relating to private roads or roads on private property. This situation frequently leaves the hearing

body without a review recommendation from county staff. As Anderson has noted in *American Law of Zoning*, however, the hearing officer is obligated to "decide on the basis of all [his] information; [he] may not default this obligation by relying wholly upon the . . . opinions of municipal officials". [op. cit., Section 21.17; see also 82 Am Jur 2d 283]

25. As Attachment 3 shows, the day care center's traffic circulation plan is dependent upon using at least a portion of the driveway which lies east of the church. If the PDW and PD recommendations for closure of the easterly access on 164th Street SW and total separation of church traffic from day care and rest home traffic were to be implemented (which the Examiner most certainly would if he were otherwise able to approve the project; see footnote, bottom of this page), then all day care traffic that used the parking area along the south side of the day care center would of necessity have to travel north along the west edge of the day care center and then make a right angle turn to exit the site easterly along the north side of the day care center. The latter portion of that route would be the route for all inbound and outbound rest home traffic. As indicated in the original decision and in the Findings above, the interior circulation system will be unclear at best and awkward at worst. The confusion regarding that circulation system could easily spill out onto the public roads thus exacerbating already critical safety conditions on 164th Street SW. (For example, motorists on 164th Street SW will see the rest home rising above the single story church building and will see the driveway entrance. Many will probably turn into the driveway only to find that they can't get to the rest home and will have to reenter the 164th Street SW traffic stream to go to 13th Avenue W. The lack of clarity in the resulting confusion adds two turning

movements onto 164th Street SW that ought to be avoided.)

26. SCC 18.45.090 requires that loading zones be provided for certain types of facilities. The kitchen in the activity building will obviously have to have a loading facility in order to handle the vehicles that will be bringing rather large quantities of food onto the site. (Testimony indicated that the kitchen would probably also be preparing meals for the day care facility.) The site plan makes absolutely no provision for any loading zone for the activity building. There is also no turnaround provided. Once a motorist gets in front of the rest home, the only way to turn around is to use one of the parking stalls. If all of the parking stalls are full it will be impossible to turn around. It would probably be impossible for service vehicles to turn around at all. This type of poor site planning has an effect upon persons other than the residents of the rest home (for example, visitors, suppliers, and clearly does not serve the general public good. The awkwardness of the on-site circulation is a mark of the overcrowding of the site.

27. If the rest home were ultimately to be granted a conditional use permit, the applicant would have to seek and obtain a building permit before construction could commence. Part of the building permit review would be to determine whether or not the relevant provisions of the Uniform Fire Code had been met. SCC

Footnote: Closure of the easterly church driveway and relocation of the westerly church driveway on 164th Street SW is justified by the preponderance of the evidence. The present connection between the two will be impossible when the 164th Street MRIP improvements are completed. The two drives would create confusing and potentially hazardous turning movements. Access to the church parking lot must be via the westerly drive. Therefore, the easterly drive would have to be eliminated.

16.04.140, as adopted August 31, 1988 with an effective date of on or about September 17, 1988 requires that "[t]urns, bends or sweeps in fire apparatus access roadways shall be designed at not less than 20 foot inside turning radii nor less than 40 foot outside turning radii." The turn at the west end of the south day care driveway, the turn at the west end of the north day care driveway and the turn that leads from the north-south driveway along the east edge of the property into the east-west driveway in front of the rest home do not meet that standard and would not be approvable. (The Examiner fully recognizes that the referenced standard is new and would not have been available for review and consideration in 1986 when the decision was rendered which is the subject of the instant proceedings. Nevertheless, this project if it ever is approved will have to comply with those standards in order to obtain a building permit and, therefore, this lack of compliance is worth noting.)

28. In conclusion, the preponderance of the evidence shows that the proposal as presented would be so significantly out of character with the surrounding R-9,600 zoned lands that it could not fairly be said to be compatible. Because of the crowded condition of the site, the Examiner cannot identify any readily apparent ways in which the problems can be resolved. Undoubtedly a wholesale redesign of the project could significantly alter these conclusions. The Examiner does not have the authority, however, to perform a wholesale redesign on an applicant's proposal. When the application as presented cannot be reasonably found to be compatible based upon the standards and criteria set forth in the county zoning code and where corrective conditions cannot be readily identified, the only alternative is denial. The Examiner is not under an obligation to try and identify for the applicant precise conditions under which approval could be granted [see

Phillips v. Brier, 24 Wn. App. 615, 623, 604 P 2d 459 (1979)].

Supplemental Findings of Fact and Conclusions issued this 2nd day of November 1988.

/s/ John E. Galt
John E. Galt, Hearing Examiner

Mailed on November 2, 1988 to:

SUPERIOR COURT in and for SNOHOMISH COUNTY

The Hon. Daniel T. Kershner, Judge

APPLICANT:

Lutheran Day Care Center

OTHER Parties OF RECORD:

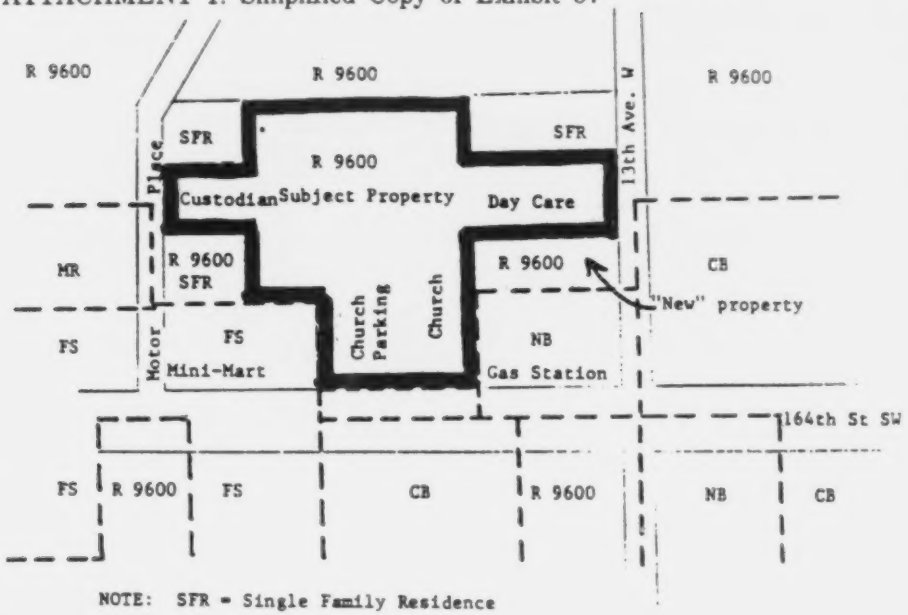
Patti Bourgault	Ken Maffitt
Diane McClary	Loretta Bennett
Frances Mann	Sharon Dodds
James Allendoerfer	Alice Dawson
Leon Faurie	Amy Nopson
Erma Bueing	Jerry Bergsman

OTHER PARTIES:

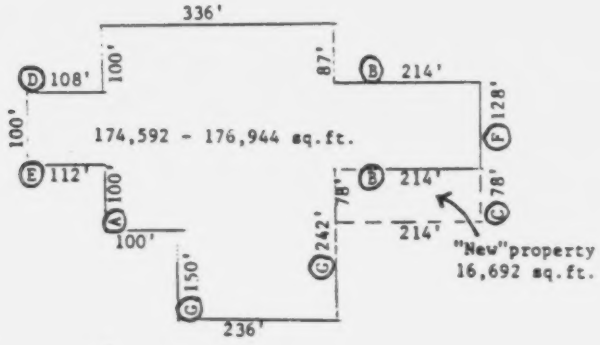
Planning Division	Community Development Division
Department of Public Works	

ATTACHMENTS TO
ZA 8402028

ATTACHMENT 1: Simplified Copy of Exhibit 57



ATTACHMENT 2: Parcel Dimensions and Area Calculations

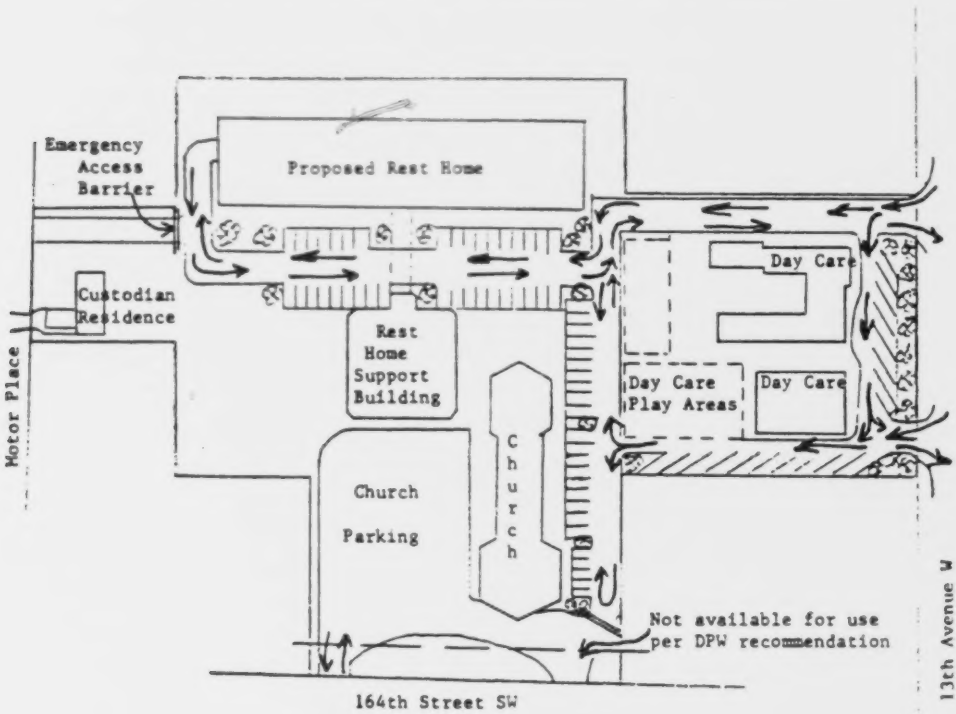


NOTE: Scale of both drawings is 1" = 200'.

BEST AVA

ATTACHMENTS TO
ZA 8402028
(Continued)

ATTACHMENT 3: Reduced and Simplified Copy of Exhibit 102



Note: Arrows indicate traffic flow directions

Scale: 1" = 100'

LABLE COPY

APPENDIX H

IN THE
SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

No. 86-2-06611-8

LUTHERAN DAY CARE, a non-profit corporation,
Petitioner/Plaintiff

vs

SNOHOMISH COUNTY; SNOHOMISH COUNTY COUNCIL;
SNOHOMISH COUNTY HEARING EXAMINER,
Respondents/Defendants

FILED

Sep 8 4:17 PM '88

KAY D. ANDERSON
COUNTY CLERK
SNOHOMISH CO. WASH.

MEMORANDUM DECISION

This matter comes before the court on a writ of certiorari for review of the decisions by the Snohomish County Hearing Examiner and the Snohomish County Council to deny the petitioner a conditional use permit (C.U.P.) for the construction of a rest home.

After thoroughly examining the files and considering the briefs and arguments submitted by the parties it appears that the Hearing Examiner's decision was predicated on the following three conclusions:

1) That the circulation system is not effective, would not serve the public use and interest, and is simply not desirable as access to a major activity on the subject property.
2) The bulk and proximity of the structure to a residentially zoned area makes it incompatible with the single family residential uses that now exist or may occur on abutting parcels.
3) The 4.89 acre site is not large enough to place a rest home when the same site already has a church and day care center. It is simply too intense a use of the subject property.

It is well settled that when acting in a quasi-judicial capacity, an administrative board or hearing examiner's conclusions must be supported by evidence in the record. *Ohio Bell Tel. Co. v. Public Utils. Comm'n*, 301 U.S. 292, 81 L. Ed. 1093, 57 S. Ct. 724 (1937); *Davidson v. Dept. of Licensing*, 33 Wn.App. 783 (1983); *State ex. rel. Perry v. Seattle*, 69 Wn.2d 816 at 821 (1966); *State ex. rel. T. S. etc. v. Kuykendall*, 421 Wn.2d 885 at 891 (1953).

There is no clear factual basis, set forth in the record, for the conclusions upon which the Hearing Examiner's decision rests, nor is there reference to standards, if any, that support the Examiner's decision. Therefore the decision of the Hearing Examiner denying the petitioner's Conditional Use Permit is remanded for further proceedings, To Wit: the entry of detailed findings of fact setting forth specific references to the record that support those findings which are the basis for the Examiner's decision and further; that any standards considered in the conclusions that are reached be clearly defined.

This court will maintain jurisdiction for the purpose of resolving any further issues that may arise.

DONE IN OPEN COURT this 7th day of September, 1988.

/s/ Daniel T. Kershner
DANIEL T. KERSHNER

APPENDIX I

SUPERIOR COURT OF WASHINGTON FOR SNOHOMISH COUNTY

NO. 86-2-06611-8

LUTHERAN DAY CARE, a non-profit corporation,
Petitioner/Plaintiff,

vs.

SNOHOMISH COUNTY; THE SNOHOMISH COUNTY COUNCIL; and THE SNOHOMISH COUNTY HEARING EXAMINER,
Respondents/Defendants.

FILED

'87 JAN 22 AM 10:10

KAY D. ANDERSON
COUNTY CLERK
SNOHOMISH CO. WASH.

WRIT OF CERTIORARI

TO: SNOHOMISH COUNTY COUNCIL

AND TO: SNOHOMISH COUNTY HEARING EXAMINER

WHEREAS, it has been represented to this Court by the Petition and Affidavit of LUTHERAN DAY CARE, a non-profit corporation of the State of Washington, that you proceeded arbitrarily, capriciously and/or unlawfully in the denial of Conditional Use Permit No. ZA 8402028; and

WHEREAS, by an Order of this Court duly given and made in the above-entitled proceedings on the 22nd day

of January, 1987 it was ordered that a Writ of Certiorari issue to you, NOW, THEREFORE,

YOU ARE COMMANDED to fully certify and return to this Court on or before March 16, 1987 a transcript of the records and proceedings in this case consisting of the following:

1. All written documents and exhibits in file no. ZA 8402028, including the decision of the HEARING EXAMINER dated November 24, 1986 and the decision of the SNOHOMISH COUNTY COUNCIL dated December 24, 1986.

2. A transcription of all testimony and proceedings which occurred at the public hearing held before the HEARING EXAMINER on November 4, 1986.

3. A transcription of all testimony and proceedings which occurred at the public meeting before the SNOHOMISH COUNTY COUNCIL on December 24, 1986.

WITNESS THE HONORABLE

JOSEPH A. THIBODEAU
JUDGE of the Superior Court in and for the County of Snohomish, Washington this 22 day of Jan, 1987.

ATTEST by my hand and seal of said Superior Court this 22 day of Jan, 1987.

/s/ Estella Spaulding, Deputy
CLERK OF THE COURT

APPENDIX J

[seal]
SNOHOMISH COUNTY
County Council Office

Bill Brubaker
Peter Hurley
Ross Kane
Liz McLaughlin
Karen Miller

M/S #609
3000 Rockefeller Avenue
Everett, WA 98201
(206) 388-3494
FAX (206) 388-3496
SCAN (206) 649-3494

CASE NO. ZA 8402028

LUTHERAN DAY CARE

OFFICIAL NOTICE OF SNOHOMISH COUNTY COUNCIL DECISION

ENTERED: December 29, 1986

STATE OF WASHINGTON)
) ss.
County of Snohomish)

I, Sheila McCallister, Asst. Clerk of the Snohomish County Council, certify under penalty of perjury under the laws of the State of Washington that the attached document is a true and correct copy of the Decision of County Council affirming the November 24, 1986 decision of the County Hearing Examiner in the case of Lutheran Day Care, ZA 8402028, now on file in the County Council Office.

/s/ Sheila McCallister

Signed at Everett, Washington, on

October 15, 1992

Date: December 29, 1986

SNOHOMISH COUNTY COUNCIL
Snohomish County, Washington

OFFICIAL NOTICE OF COUNCIL DECISION

In re the case of: An appeal from the Hearing Examiner's decision in the case of LUTHERAN DAY CARE, ZA 8402028 requesting a conditional use permit to establish a rest home.

NOTICE IS HEREBY GIVEN, that on December 24, 1986 the following decision in this matter was entered by the Snohomish County Council: Upon unanimous vote, the Snohomish County Council approved a motion to adopt the findings and conclusions of the Hearing Examiner and uphold his November 24, 1986 decision.

FURTHER NOTICE IS GIVEN that any aggrieved party wishing to appeal this decision must do so by commencing said appeal in Snohomish County Superior Court, Everett, Washington, on or before January 12, 1987 (SCC 2.02.190). If a Judicial appeal of State Environmental Policy Act issues is to be brought, a Notice of Intent must be filed with the Clerk of the Council on or before January 12, 1987 (SCC 23.40.040(4)). SEPA issues must be raised in any judicial appeal within thirty days of the date of this notice.

Dated this 29th day of December, 1986

SNOHOMISH COUNTY COUNCIL

/s/ Sheila McCallister
Sheila McCallister
Assistant Clerk of the Council

SNOHOMISH COUNTY COUNCIL

COUNCIL MOTION

APPEAL FROM HEARING EXAMINER DECISION IN FILE NO. ZA8402028, LUTHERAN DAY CARE, DENYING A CONDITIONAL USE PERMIT TO ESTABLISH A REST HOME

WHEREAS, Lutheran Day Care, a non-profit corporation, applied to Snohomish County for a conditional use permit to establish a rest home on property located on the north side of 164th Street SW, extending from Motor Place on the west to 13th Avenue W (Meadow Road) on the east, west of Martha Lake;

WHEREAS, the Snohomish County Hearing Examiner issued his decision on November 24, 1986, to deny the application for a conditional use permit; and

WHEREAS, the Snohomish County Council held a public meeting on December 24, 1986, to consider the applicant's appeal of the Hearing Examiner's decision; and

WHEREAS, after considering the appeal based upon the record, the Snohomish County Council did concur with the findings and conclusions of the Hearing Examiner and did adopt such findings and conclusions and affirmed the Hearing Examiner's decision to deny the conditional use permit.

NOW, THEREFORE, ON MOTION:

Section 1: The Snohomish County Council makes the following findings of fact and conclusions:

1. The Council does hereby adopt the findings and conclusions of the Hearing Examiner as found in the November 24, 1986, decision of the case of Lutheran Day Care, ZA8402028.

SECTION 2: The Snohomish County Council enters its decision in the appeal of Lutheran Day Care:

1. The Council does hereby affirm the decision of the Hearing Examiner to deny the conditional use permit for Lutheran Day Care.

DATED: Dec. 24, 1986.

/s/ Bruce Agnew
BRUCE AGNEW, Chairman

ATTEST: /s/ Sheila McCallister
Asst. Clerk of the Council

APPENDIX K

[SEAL]
Snohomish County
Hearing Examiner's Office

Iohn E. Galt
Hearing Examiner
Peter T. Donahue
Deputy

M/S #405
3000 Rockefeller Ave.
Everett, WA 98201
(206) 388-3538

CERTIFICATION OF THE:

DECISION OF THE HEARING EXAMINER
REVISED AFTER COURT REMAND
ENTERED NOVEMBER 24, 1986

APPLICANT NAME: LUTHERAN DAY CARE

CASE NO.: ZA 8402028

STATE OF WASHINGTON)
) ss
COUNTY OF SNOHOMISH)

I, Mary Kurke, Clerk of the Hearing Examiner for the Snohomish County Hearing Examiner, certify under penalty of perjury under the laws of the State of Washington that the attached document is a true and correct copy of the original Decision of the Hearing Examiner dated November 24, 1986 under county file number ZA 8402028 and now on file in the Hearing Examiner's Office.

/s/ Mary Kurke
Signed at Everett, Washington on
October 15, 1992

References *1 and *2 in paragraphs 1 and 5 on App. 100a to 103a of Part II: Findings of Fact in the attached decision are as follows:

*1 Attachment 1 is the Hearing Examiner's decision of February 22, 1985 which is reproduced in its entirety as Appendix T in this Petition for a Writ of Certiorari.

*2 Attachment 2 is the Hearing Examiner's decision of July 3, 1985 which is reproduced in its entirety as Appendix R in this Petition for a Writ of Certiorari.

Office of the
HEARING EXAMINER
Snohomish County, Washington

DECISION of the HEARING EXAMINER

REVISED AFTER COURT REMAND

PART I: SUMMARY INFORMATION

APPLICANT: LUTHERAN DAY-CARE (A NON-PROFIT CORPORATION)

FILE NO.: ZA 8402028

REFERENCE TAX ACCOUNT NUMBER: 3737-008-007-0513

TYPE OF REQUEST: Conditional use permit to establish a rest home.

SUMMARY OF REQUEST:

Location: The subject property is located on the north side of 164th Street SW, extending from Motor Place on the west to 13th Avenue W (Meadow Road) on the east, west of Martha Lake.

Section 2, Township 27N, Range 4E, W.M.

Comprehensive Plan - Area: North Creek
Designation: Freeway Service

Acreage: 4.89 acres

Zoning: Residential-9,600 (R-9,600)

Utilities - Water: Alderwood Water District
Sewage: Alderwood Water District

School District: Edmonds

Fire District: No. 1

SEPA COMPLIANCE: Determination of Nonsignificance issued by the lead department.

PROCEDURAL BACKGROUND:

1. The Examiner viewed the subject property and its surroundings on May 14, 1984.

2. The Examiner held a public hearing on the subject application on November 4, 1986. (See Exhibits 56 and 71 for a record of prior hearings regarding the instant application.)

SELECTED AGENCY RECOMMENDATIONS (ABBREVIATED):

Department of:
Community and Educational Services: No comment received
Planning and Community Development:
Development Division: No objection
Planning Division: Approve with conditions
Public Works: Approve with conditions
Snohomish Health District: No objection subject to public water and sewer service

HEARING EXAMINER DECISION (SUMMARY):
Deny

PLEASE NOTE: A reformatted, restructured zoning code went into effect on July 1, 1986. All zoning code (Title 18 SCC) citations in this decision are to the new code unless specifically stated otherwise.

PART II: FINDINGS OF FACT

The Examiner, having viewed the property, weighed the evidence presented and heard the testimony of the parties, makes the following Findings of Fact:

1. The Examiner has issued two prior decisions regarding the instant application. On February 22, 1985 the application was returned to the applicant "for compliance with Title 26B and reevaluation of SEPA Threshold De-

termination" (Exhibit 56). Attachment 1 hereto contains excerpts from said decision. On July 3, 1985 the Examiner denied the application after a hearing which followed reactivation of the request by the applicant (Exhibit 71). Attachment 1 hereto contains excerpts from said decision. *1

2. The Examiner's second decision (Exhibit 71) was appealed to the County Council by the applicant (Exhibit 72). On August 7, 1985 the Council voted unanimously to sustain the Examiner's decision (Exhibit 85).

3. The applicant appealed the Council's action to the Superior Court for Snohomish County under Cause No. 85-2-03274-6. On July 1, 1986 a judgement was entered in Superior Court which stated in relevant part the following:

> "1. The retirement center which the Petitioner proposes to construct constitutes a 'rest home' as defined in the Snohmish County Zoning Code, and is an allowed use (with a Conditional Use Permit) in the Single-Family Residential zoning classification. The determinations to the contrary which have been entered by the SNOHOMISH COUNTY HEARING EXAMINER and the SNOHOMISH COUNTY COUNCIL are erroneous as a matter of law and are hereby REVERSED.
>
> "2. The Petitioner's application for a Conditional Use Permit is hereby remanded to the SNOHOMISH COUNTY HEARING EXAMINER for a new hearing on the merits of the case." (Exhibit 87)

Snohomish County filed an appeal from the Superior Court decision with the Washington State Court of Appeals. Snohomish County concurrently filed a motion in Superior Court asking for an order staying any and all actions associated with the proposed rest home. Said request was

denied by Superior Court. The Examiner takes official notice that the briefing schedule before the Court of Appeals will not be concluded until some time in early 1987 and, apparently, no date for oral argument before said Court has yet been set.

4. The requested conditional use permit is now again before the Examiner at the applicant's initiative. The applicant is aware of the pending appeal before the Court of Appeals but has asked that the county proceed on with its consideration of the application pursuant to the remand order from Superior Court.

5. The version of the proposed site development plan which the Examiner denied on July 3, 1985 is Exhibit 52. Attachment 2 contains the Examiner's textual description of the applicant's proposal (Attachment 2, Findings 3 and 4).*2 The project has been somewhat revised since the date of the Examiner's last decision. The current site plan is Exhibit 85. The major differences between Exhibits 52 and 85 are as follows:

A. The dining room/kitchen/activity room structure has been physically separated from the dwelling portion of the facility and moved to the south. A "skybridge" connects the second floor of the dwelling structure with the roof of the dining room/kitchen/activity room building which, as in previous plans, would contain an outdoor sport court.

B. The parking and circulation has been revised in concert with the relocation of the dining room/kitchen/activity room building. The new circulation plan now allows traffic to flow east and west between the dwelling building and the dining room/kitchen/activity room building. The rest home can now be accessed from either the driveway adjacent to the north side of the day care facility from 13th Avenue W

or from the easterly driveway serving the church from 164th Street SW.

C. The swimming pool and jacuzzi have been moved to a new location on the site.

D. The southwest corner of the subject property has been converted to a grassy landscaped area from its formerly proposed parking lot. The total number of parking stalls appears to have been somewhat reduced.

In all other respects the building plans, the interior floor plan arrangement and the textual description of the project remains as it was at the time of the July 3, 1985 decision.

6. The Planning Division (PD) of the Department of Planning and Community Development has recommended that the application be approved subject to a precondition and certain conditions. The precondition as suggested would require submittal of a revised site plan which would: eliminate all private improvements from a 25 foot strip of land fronting 164th Street SW which is proposed for dedication to Snohomish County for road purposes; relocate all improvements within five feet of the new r/w line except for landscaping and one driveway onto 164th Street SW; eliminate the present easterly driveway onto 164th Street SW; and relocate the westerly driveway to a point not less than 25 feet east of the west property line. The applicant has expressed some objection to the concept of eliminating one of the driveway accesses onto 164th Street SW but has no objection to relocating the westerly driveway. As far as the recommended conditions are concerned, the applicant has no objection to proposed Conditions 1-8 but strenuously opposes recommended Condition 9 which reads as follows: "All kitchen, kitchenette and wetbar facilities outside the cafeteria shall be eliminated from the project and no food preparation, storage or serving facilities or [appliances] shall be allowed in any individual room." (Exhibit 99) The PD is of the opinion that the

presence of such facilities within the individual rooms and on the individual living floors is inconsistent with the concept of a "rest home" (Exhibit 99).

7. Neighboring property owners as well as community groups continue to be rather uniformly opposed to the construction of the proposed facility (new documents expressing opposition are Exhibits 93, 100 and 105-107). The opponents still argue that the proposed use would be highly incompatible with its surroundings, does not constitute a "rest home", would create adverse traffic impacts on 13th Avenue W and 164th Street SW and would be inconsistent with the adopted comprehensive plan for the area.

8. Chapter 49, Laws of Washington, 1982, 1st Ex. Session, was approved by the Governor on April 20, 1982, and became effective on July 1, 1982. Section 5 of said law amended RCW 82.02.020 so as to provide guidance to cities and counties regarding the imposition of what are commonly called "up-front development fees". Said Section provided, *inter alia*, that "[n]o county, city, town, or other municipal corporation shall impose any tax, fee, or charge, either direct or indirect, on the . . . subdivision, classification or reclassification of land. However, this section does not preclude dedication of land or easements pursuant to RCW 58.17.110 within the proposed development or plat which the county . . . can demonstrate are reasonably necessary as a direct result of the proposed development or plat to which the dedication of land or easement is to apply. This section does not prohibit voluntary agreements with counties . . . that allow a payment in lieu of land dedication or to mitigate a direct impact that has been identified as a consequence of a proposed development, subdivision, or plat. . . ." Said law also provides guidance regarding voluntary agreements and deals with certain other topics. It is official county policy that Title 26B SCC, as revised and updated in April of 1982 and July of 1983, is in compliance with Chapter 49, Laws of Washington, 1982, 1st. Ex. Session.

9. Title 26B SCC (commonly known as the County Road Ordinance) requires certain actions by applicants dependent upon the computed Level of Service (LOS) of adjacent road systems.

10. SCC 26B.52.030 authorizes the Council to adopt a Master Road Improvement Program (MRIP) in cases where major road deficiencies are occurring [Subsection (1)] and provides that an MRIP, once adopted by the Council, shall be employed in lieu of all other developer obligations under Title 26B SCC [Subsection (4)].

11. The Council adopted an MRIP for "the 2.75-mile section of 164th Street [SW/SE] between the City of Mill Creek and 36th Avenue West" by Resolution 86-045 on May 5, 1986. Said road section "has recently experienced traffic deficiencies (unsafe conditions) of major proportions that have created public inconvenience and hazards" (164th MRIP, p. 2). The 164th Street MRIP identified required improvements, estimated improvement costs, established a separate per vehicle proportionate share for the east ($76.00/trip) and west ($55.00/trip) segments of the MRIP section, provided a trip generation chart and created a trip generation zone map (164th MRIP, pp. 3, 5, 6, 12 and 13).

12. The trip generation zone map supercedes the definition of "road system" in SCC 26B.51.080 and provides that "the boundary of the geographic area, within which developments shall be obligated for Proportionate Share Mitigating Payments . . ., shall be defined as that area that falls within a radius of 10,000 feet from the defined section of 164th Street as shown on the trip generation zone map." (164th MRIP, p. 9) The subject property lies within the 100% contribution zone on said map.

13. The applicant has calculated a proportionate share based upon a special trip generation rate for retirement housing. The applicant's financial share based upon said calculation would be $17,556.00. The applicant has offered

to pay said share as well as to dedicate r/w along both 164th Street SW, 13th Avenue W and Motor Place (Exhibit 87, Sheet 5). The Department of Public Works (DPW) has reviewed the applicant's calculation and concurs that it is consistent with the traffic generation information in the record and with the 164th Street MRIP (Exhibit 88). The DPW therefore recommends that the r/w donation and MRIP contribution be accepted. The DPW has noted that the correct amount of r/w to be deeded along 164th Street SW would be 25 feet rather than the 20 feet stated by the applicant in Exhibit 87 (Exhibit 101).

14. The DPW supports the PD's suggestion that the existing easterly driveway onto 164th Street SW be abandoned as a condition of project approval. Both the DPW and the PD feel that the existence of such a driveway would lead to adverse turning movement activities which could be avoided if only church activities had access onto 164th Street SW. As has been previously indicated, the applicant opposes the elimination of the easterly driveway arguing both that its existence will not draw much traffic associated with the rest home and that it is therefore not clearly linked to the proposed facility.

15. The applicat has presented a preliminary drainage plan (Exhibit 102) which shows how the storm drainage associated with the entirety of the applicant's operations on the subject property would be collected and detained in a large underground storage pipe prior to discharge from the property into the public road drainage facilities along Motor Place. Title 24 SCC, the county drainage ordinance, requires that preparation of a detailed drainage plan be made a condition of the instant approval to be fulfilled prior to the initiation of any site work unless the DPW has expressly waived such a requirement. The DPW has determined that a detailed drainage plan will have to be submitted and approved prior to initiation of any construction activities (Exhibit 101).

16. The Snohomish Health District has indicated that it has no objection to the proposed addition provided that both public water and service are available (Exhibit 98).

17. The record discloses that the Alderwood Water District can provide both services to the proposed facility (Exhibit 29).

18. The PUD indicated that adequate electrical service can be provided to the instant development with distribution facilities as they presently exist (Exhibit 95).

PART III: CONCLUSIONS

1. Legal notice of the public hearing was given as required by county code (Exhibits 94 and 96).

2. A question arose during the hearing as to whether or not the provisions of the current version of the Snohomish County Zoning Code (which became effective on July 1, 1986) or the provisions of the zoning code as it existed prior to said date would be applicable to the instant proposal. The project must be evaluated against the provisions of the county zoning code as it existed prior to July 1, 1986 for two reasons. First, "Washington does adhere to the minority rule that a landowner obtains a vested right to develop land when he or she makes a timely and complete building permit application that complies with the applicable zoning and building ordinances in effect on the date of the application. Our vested rights rule also has been applied to building permits, conditional use permits, a grading permit, and a [shoreline management] substantial development permit." [*Norco Construction v. King County*, 97 Wn.2d 680 (1982) at 684, citations omitted] Therefore, since the application was submitted long before the zoning code was revised, the provisions of the code at the time of submittal would remain applicable throughout the life of the application. Secondly, the case is now before the Examiner as a result of a remand from Superior Court. The decision which led to the court's action sub-

stantially predates the change in county code. Common sense therefore suggests that the code as it existed at the time of the earlier county decisions would remain applicable in the context of the instant remand consideration. As a practical matter, there is virtually no difference between the pre- and post-July 1, 1986 versions of the county zoning code that would be applicable to the instant application with the singular exception of the fact that the zoning code definitions affecting "rest homes" have been changed.

3. There were three issues that led the Examiner to deny the application on July 3, 1985 (See Attachment 2 hereto): a conclusion that the proposed use was not allowed in the R-9,600 zone; a conclusion that the applicant had not fully complied with the procedural and substantive provisions of Title 26B SCC; and a conclusion, based upon the Title 26B SCC shortcomings, that the Determination of Nonsignificance was inappropriate.

4. The question of the allowability of the proposed use has at least temporarily been resolved by the Superior Court decision in favor of the applicant. In the absence of a court ordered stay in these proceedings and faced with the applicant's desire to have the Examiner move forward with this application, the Examiner is obligated to operate within the framework of the decision handed down by the Superior Court. In that context, the Examiner cannot support the PD's recommended Condition No. 9 regarding the elimination of all wetbar and associated facilities from each room and the elimination of the kitchenettes from each floor. Those elements of the applicant's proposal were clearly set forth in the decision which was before the Superior Court and one must presume were familiar to the court when it concluded that the project as proposed constituted a "rest home". The county should not now seek to change the character of the project by imposing conditions that would be contrary to the ruling laid down by the Superior Court. (This conclusion quite

obviously in no way suggests that either the County Council, the Examiner nor any other county official has changed its position with respect to the pending appeal before the Washington State Court of Appeals. The conclusion simply recognizes the reality of the present situation and indicates that until such time, if ever, as the Superior Court decision is reversed or vacated, the county must act in accordance therewith.) The Superior Court order therefore removes the primary ground for denial raised in the July 3, 1985 decision.

5. The adoption by the County Council of the 164th Street MRIP and the applicant's offer to participate on a proportionate share basis in accordance with said MRIP completely eliminates all previously identified deficiencies regarding Title 26B SCC compliance.

6. The rejection of the DNS was based upon the unmitigated adverse traffic impacts. Given the existence of the 164th Street MRIP and the applicant's willingness to participate therein, it must be concluded at this point that the SEPA deficiency has also been corrected. The environmental evaluation and threshold determination made by the lead department constitutes, based upon the evidence in the record before the Examiner, adequate compliance with the State Environmental Policy Act. All evidence of environmental impact relating to the proposed action and reasonable alternatives to the proposed action have been considered by the Examiner. The determination that an Environmental Impact Statement does not need to be prepared does not mean that there are no adverse environmental impacts. The county has authority under the police power to mitigate identified impacts as deemed necessary to protect public health, safety and welfare.

7. The Examiner has never issued a decision in the instant case in which the outcome was specifically based upon an analysis of the merits of the applicant's proposal. However, even as early as the first decision (Exhibit 56

and Attachment 1 hereto) the Examiner expressed concern about certain issues which could "become significant considerations in the future." (Exhibit 56, Conclusion 10) The issues thus raised (excluding the underlying question of the allowability of the use) were: the crowding of the site by the addition of a rest home to a parcel already containing a large day-care center, a church, a "family center" and a caretaker's residence; the bulk of the structure and its ability to blend into the residential environment bordering on the north; and concerns regarding possible subdivision of the site (Exhibit 56, Conclusions 12-14). The subsequent decision (Exhibit 71) also mentioned concerns regarding the functional utility of the site plan as then proposed (Conclusion 18).

8. A conditional use is one which has been legislatively determined to be allowed within a given zone if appropriate conditions can be imposed to insure its compatibility with those uses which are permitted as a matter of right within that zone. A conditional use thus carries a fairly heavy assumption of acceptability within the zone within which it has been included. Since a conditional use permit does not involve a change in the zoning of the subject property, and since only those uses which have been specifically listed within a zone can be granted a conditional use permit in that zone, it is generally not relevant to question the adopted area comprehensive plan. In his consideration of any conditional use permit application, the Examiner is required to consider the degree of compatibility which would exist between the use and its particular surroundings and may impose such necessary conditions as are required "to establish parity with uses permitted in the same zone in their freedom from nuisance generating features in matters of noise, odors, air pollution, wastes, vibration, traffic, physical hazards and similar matters." [SCC 18.72.060(D)] If compatibility cannot be insured, the permit may be denied. On the other hand, if compatibility can be insured, then the permit must be ap-

proved. SCC 18.88.060 as it existed both at the time of permit application and at the time of both of the Examiner's prior hearings stated that "[w]hen considering an application for a conditional use permit, the examiner shall consider the applicable standards, criteria and policies established by this title as they pertain to the proposed use and may impose specific conditions precedent to establishing the use. The conditions may: . . . (5) assure that the degree of compatibility with the purpose of this title shall be maintained with respect to the particular use on the particular site and in consideration of other existing and potential uses, within the general area in which the use is proposed to be located." (The identical provision can now be found in the revised version of the zoning code at SCC 18.72.060).

9. As in the past decisions, the Examiner must again conclude that the proposed circulation system is not effective and would not serve the public use and interest. The main ingress/egress to the retirement center would be the two way driveway running along the north edge of the day-care facility. At the end of that driveway, a motorist would have to make a sharp right angle turn to the left followed by an immediate right angle turn to the right in order to get to the main entry to the rest home. Those turning movements would occur immediately adjacent to a fenced play yard for the day-care facility. The circulation plan is simply not desirable as access to a major activity on the subject property.

10. The applicant has done nothing to alleviate the Examiner's concerns regarding the bulk of the structure and its impact upon the surrounding area. It must first be recognized that the entirety of the rest home activity would be occurring on those portions of the property lying north of any of the commercial zoning which borders the site to the east and the west along 164th Street SW (Exhibit 57). The portion of the property on which the dwelling unit part of the facility would be built is in fact surrounded

on three sides by single family zoned property. As has been said in earlier decisions (See the Attachments hereto) the structure will effectively appear to be a four story building running the entire width of the property. When such a large structure is placed as close to the property lines as the applicant has proposed, the Examiner simply cannot conclude that it would be compatible with single family residential uses that might now exist and occur on abutting parcels.

11. Another concern is the increase in the intensity of use to which the subject property is being put. The applicant already has a day-care center housing upwards of 100 children at any one time and serving (apparently) a family base of some 2,000, a church and some kind of a school on the subject property. The applicant is now seeking to place a use which in and of itself could easily justify an entire 4.89 acre site for its own purposes. The problems with circulation and with the mass of the building are simply indicators of the attempt to place too much on too small a parcel of property. The resultant density would be substantially incompatible with the present and future uses on the abutting R-9,600 zoned lands.

12. The Examiner has another concern which, frankly, can probably not be stated as a ground for denial of the application but which, nevertheless, raises serious doubts about the efficacy of approving the project. In order to try and solve some of the site circulation problems, the applicant has chosen to separate the communal dining facility from the dwelling portion of the facility. With the current proposal, all residents would have to walk outdoors in order to eat their meals. Even acknowleing the fact that the "skybridge" would form a sort of covered walkway for tenant use, it hardly seems desirable for people who are living in a retirement "rest home" to go outdoors three times a day 365 days a year in order to eat breakfast, lunch and dinner.

13. The instant application has apparently become somewhat of an emotional issue not only for the applicant but also for a number of the neighbors and other opponents. The Examiner wishes to indicate for the record that certain of the issues raised by the parties (in particular the allegations regarding ownership of the site and the activities thereon) have not entered into the instant decision. The decision is based solely upon the facts and conclusions set forth in the above portions of this decision and in the Attachments hereto. The Examiner also wishes to reemphasize Conclusion No. 23 of Exhibit 71 (See Attachment 2 hereto): the Examiner is not opposed to the provision of this type of facility if it can be done compatibly with both existing and proposed uses of surrounding properites. Unfortunately, the Examiner has reached the conclusion that such cannot be done in the instant case and, therefore, the application must be denied.

14. The Examiner intends, and has no knowledge or belief to the contrary, that the requirements, limitations and conditions imposed by the instant decision are only such as are lawful and within the authority of the Examiner to impose pursuant to Title 18 SCC.

PART IV: DISPOSITION

The Examiner hereby DENIES the requested CONDITIONAL USE PERMIT.

Decision issued this 24th day of November, 1986.

/s/ John E. Galt
John E. Galt, Hearing Examiner

* * *

***** NOTICE to PARTIES of RECORD *****

The above decision of the Hearing Examiner is final and conclusive with right of appeal to the County Council. The

grounds for filing an appeal of an Examiner decision shall be limited to the following: a) newly discovered evidence which is material to the Examiner's decision and which could not reasonably have been produced at the Examiner's hearing; b) the Examiner exceeded his jurisdiction; c) the Examiner failed to follow the applicable procedure in reaching his decision; d) the Examiner committed an error of law or misinterpreted the applicable comprehensive plan, provisions of the Snohomish County Code, or other county or state law or regulation; or e) the Examiner's findings and conclusions are not supported by the record. Any such appeal shall be filed by the applicant, a department of the county, or other aggrieved person or agency with the Department of Planning and Community Development, 4th floor, County Administration Building, Everett, Washington 98201, within ten (10) calendar days following the rendering of the Examiner's decision. All appeals shall be in writing, shall contain a detailed statement of the grounds for appeal and the facts upon which the appeal is based, and shall be accompanied by a fee of $50.00: Provided, that the fee will not be charged to a department of the county or to other than the first appellant. Please use the county file number on all future correspondence with the county regarding this case. [SCC 2.02.170]

Mailed on November 24, 1986, to:

APPLICANT:
Lutheran Day Care Center

OTHER PARTIES OF RECORD

Patti Bourgault	Ken Maffitt
Diane McClary	Loretta Bennett
Frances Mann	Sharon Dodds
James Allendoerfer	Alice Dawson
Leon Faurie	Amy Nopson
Erma Bueing	Jerry Bergsman

OTHER PARTIES:

Planning Division
Department of Public Works

Community Development Division

APPENDIX L

[seal]
Snohomish County
Hearing Examiner's Office
John E. Galt
Hearing Examiner
Peter T. Donahue
Deputy
M/S #405
3000 Rockefeller Ave.
Everett, WA 98201
(206) 388-3538

CERTIFICATION OF THE:

ORDER OF THE HEARING EXAMINER ISSUING A CONDITIONAL USE PERMIT AS DIRECTED BY THE SUPERIOR COURT ENTERED MARCH 15, 1989

APPLICANT NAME: LUTHERAN DAY CARE

CASE NO. ZA 8402028

STATE OF WASHINGTON)
) ss
COUNTY OF SNOHOMISH)

I, Mary Kurke, Clerk of the Hearing Examiner for the Snohomish County Hearing Examiner, certify under penalty of perjury under the laws of the State of Washington that the attached document is a true and correct copy of the original Order of the Hearing Examiner dated March 15, 1989 under county file number ZA 8402028 and now on file in the Hearing Examiner's Office.

/s/ Mary Kurke

Signed at Everett, Washington on October 15, 1992

Office of the
Hearing Examiner
Snohomish County, Washington

CASE NO.: ZA 8402028
Lutheran Day Care

STATE OF WASHINGTON)
) ss
COUNTY OF SNOHOMISH)

ORDER OF THE HEARING EXAMINER ISSUING A CONDITIONAL USE PERMIT AS DIRECTED BY THE SUPERIOR COURT

WHEREAS, on December 24, 1986 the Snohomish County Council did deny a Conditional Use Permit application for a senior citizen rest home under county file no. ZA 8402028 which had been filed by Lutheran Day Care (a non-profit corporation, hereinafter referred to as the "applicant") (Exhibit 117); and

WHEREAS, the applicant appealed said denial under a Writ of Certiorari to the Superior Court in and for Snohomish County under court cause no. 86-2-06611-8; and

WHEREAS, on September 7, 1988 said court issued a Memorandum Decision requesting the entry of additional findings and conclusions by this Examiner (Exhibit 118. The Examiner's office has assigned exhibit number 118-122 to key documents relating to the court appeal.); and

WHEREAS, on November 2, 1988 this Examiner issued Supplemental Findings of Fact and Conclusions as directed by said Court (Exhibit 119); and

WHEREAS, on February 9, 1989 said Court issued an Order remanding the above referenced application "to the Snohomish County Council for the immediate issuance of

a Conditional Use Permit for the rest home project as proposed by the [applicant]" (Exhibit 120); and

WHEREAS, on February 22, 1989 the County Council passed Motion 89-050 remanding the above referenced case "to the Snohomish County Hearing Examiner for immediate issuance of a conditional use permit with conditions to operate a rest home." (Exhibit 121); and

WHEREAS, the County Council declared in Motion No. 89-050 "that a public hearing is not necessary" prior to issuance of the court-ordered conditional use permit (Exhibit 121); and

WHEREAS, the Examiner has authority under SCC 2.02.100(9) to issue Summary Orders in supplementary proceedings; and

WHEREAS, the instant situation presents such a proceeding.

NOW, THEREFORE, the Examiner makes and enters his:

FINDINGS OF FACT

1. The Superior Court's Order (Exhibit 120) "finds that the Hearing Examiner's Order, even as supplemented, is not supported by the evidence in the record and is not based upon ascertainable standards . . . . These findings and conclusions by the Hearing Examiner constitute willful and unreasonable action without consideration and in disregard of the relevant facts and circumstances. The denial of the Conditional Use Permit on these grounds is arbitrary, capricious and unlawful. This Court finds that the internal circulation system, the bulk and dimensional elements of the project, the site plan, and the density of development, as proposed by the [applicant], are reasonable and acceptable based upon the evidence in the record and upon the ascertainable standards of Snohomish

County." The Court thus remanded the instant matter to the County for "immediate issuance" of a Conditional Use Permit and stated that "[r]easonable conditions of a technical nature may be imposed on the project provided that the same are based upon evidence in the record and upon ascertainable standards. No conditions may be imposed which would be inconsistent with the findings of this Court."

2. As indicated in the above recitals, the County Council has further remanded the instant application to this Examiner "for immediate issuance of a Conditional Use Permit with conditions to operate a rest home. The Department of Planning and Community Development should pay special recognition to the impact of the 164th St. Master Road Improvement Program at the time of issuance of building permits." The Council has also ordered that the Examiner comply with the remand without convening any additional public hearings (Exhibit 121).

3. A new site plan has been prepared by the applicant and submitted to the County. The Examiner has been advised by both the applicant's legal counsel and by Snohomish County's legal counsel that said revised plan was presented to the Council prior to the enactment of Motion 89-050 but was not presented to the Court prior to the issuance of its Order. The revised site plan has been marked as Exhibit 122. The applicant's counsel has informed the Examiner that the applicant desires approval of Exhibit 122.

4. Exhibit 85A was the latest site plan submitted to the County during the proceedings leading up to the Court appeal. Exhibit 52 was the site plan submitted prior to Exhibit 85A. (Exhibit 102 is a "storm detention plan" which has on certain occasions been argued to have been a more recent site plan than Exhibit 85A.)

Exhibit 122 is different in at least ten respects from the previously submitted site plans:

A. The notation "(future underground parking)" has been added in two places on the parking area immediately south of the proposed rest home building. The concept of having underground parking on that part of the site has never before been shown on any site plan nor was it ever discussed in any of the prior proceedings. The applicant has always proposed underground parking under the rest home building itself but has never proposed underground parking anywhere else on the site.

B. Exhibit 122 indicates that the driveway along the north side of the day care facility would be used solely for ingress to the rest home area from 13th Avenue W. Exhibit 85A indicates that said driveway would be used for both ingress and egress.

C. Exhibit 122 indicates that the driveway along the south side of the day care area would be used solely as egress from the site to 13th Avenue W. Said driveway is not portrayed at all on Exhibits 52 and 85A. Said driveway is shown on Exhibit 102 and is depicted (in accordance with the approved, binding site plan for the day care center) as an ingress only drive.

D. Exhibit 122 portrays a single, combined ingress/egress drive onto 164th Street SW. Said driveway has been relocated as generally recommended by the Department of Public Works (DPW) in its previous staff recommendations. Exhibit 122 indicates that the existing two driveways onto 164th Street would be abandoned. None of the prior plans showed the centralized driveway and abandonment of the existing driveways.

E. The circulation pattern at the southeast corner of the rest home building (in other words at the end

of the ingress drive along the north side of the day care facility) has been revised to eliminate the double right angle turns. The revision has resulted in the elimination of one parking stall and the addition of a traffic island to delineate traffic movements. The revision also indicates that a small triangular corner of the day care center's fenced play yard would be cut off.

F. The north property line has been moved five feet to the north in order that the textual dimension calling for a 35 foot setback between the day care center and the north property line would be properly reflected by the portrayal on the site plan. The five foot adjustment has resulted in the portrayal of a site which is five feet greater in north-south dimension than shown on any of the prior site plans and which is also five feet greater in dimension than actually exists.

G. The acreage figure in the textual material on Exhibit 122 has been revised downward from 4.89 acres to 4.06 acres.

H. A notation in the driveway area at the southeast corner of the church indicates that both ingress and egress traffic would pass in front of (south of) the church. Previously submitted site plans have not identified routing plans in that area.

I. One of the three previously shown handicapped parking stalls and one standard parking stall have been removed and replaced with a loading zone near the northeast corner of the support building. The total number of parking stalls adjacent to the south side of the rest home building has been reduced from 36 to 33. The number of remaining parking stalls (which is at least 83 directly associated with the rest home) exceeds the minimum of 77 required by the county zoning code [SCC 18.45.040(C.1)]

There are also a substantial number of parking stalls which remain on the site plan specifically associated with the church. Additional parking stalls have also been approved for the associated day care center (most of which are located on property included within the applicant's legal description for the subject application).

J. A 25 foot strip along the south edge of the property adjacent to 164th Street SW has been shown for dedication to Snohomish County for r/w purposes. Said strip was portrayed on Exhibit 102 but was not portrayed on either Exhibit 85A or 52.

5. There are at least five specific Snohomish County regulatory standards which are violated by various portions of Exhibit 122:

A. The southerly egress (eastbound) drive through the "new" day care property to 13th Avenue W is shown on the approved, binding site plan for the day care center expansion as a one-way ingress (westbound) drive only. Angled parking is shown adjacent to said drive and is arranged in such a fashion that the driveway could only be used for westbound traffic. Exhibit 122 indicates that said driveway would be used only for eastbound, outbound traffic. Such a depiction is directly in conflict with an approved, binding site plan for a previously issued Conditional Use Permit which encompasses a portion of the subject property and all of what the Examiner described in Exhibit 119 as the "new property" (see Exhibit 119, Attachments 1 and 2). The "new property" is not part of the instant application.

B. The portrayed circulation system in the vicinity of the southeast corner of the subject property conflicts with the provisions of Chapters 18.43 and 18.45 SCC. SCC 18.43.060(B) requires "a minimum

five (5) foot wide type 'III' buffer along the entire street frontage except for driveways". SCC 18.45.100(A) requires that "building sites which contain more than one hundred (100) parking spaces shall be designed with access lanes and fire lanes not less than twenty-five (25) feet in width." The 25 foot wide minimum standard is applicable since the subject property is a building site which will contain well over 100 parking stalls when the rest home is added. Exhibit 122 does not provide a five foot landscaped strip along the edge of the new r/w line. The lack of such a strip is in direct violation of SCC 18.43.060(B). The distance between the new r/w line and the nearest point of the walkway which surrounds the church building is exactly 20 feet according to Exhibit 122. It is impossible to put a 25 foot wide fire lane in a 20 foot wide space. It is also even less possible to meet the code requirement after the five foot landscape strip is in place. The circulation back and forth next to the church will have to be eliminated. Such elimination will also bring the circulation into line with the DPW recommendation to separate the church and rest home traffic (see Exhibit 101).

C. SCC 16.04.140 amends Section 10.207(g) of the Uniform Fire Code (UFC) to read as follows: "turns, bends or sweeps in fire apparatus access roadways shall be designed at not less than 20 foot inside turning radii nor less than 40 foot *outside turning radii.*" (emphasis in original) Section 10.207(c) UFC requires an unobstructed width not less than 20 feet for all fire apparatus access roads. The outbound right turn for eastbound to southbound traffic at the southeast corner of the rest home does not meet the 20 foot inside radius standard. The width of the inbound and outbound lanes at the southeast corner of the rest home does not

meet the 20 foot width standard. The access ramp to the lower parking area under the rest home has two corners which meet neither the 20 foot inside nor 40 foot outside radius standard. The southbound to eastbound turn into the outbound driveway through the south portion of the day care center does not meet the 20 foot inside radius standard.

D. Exhibit 122 indicates that a six foot high cedar screening fence would be built completely across the outbound driveway through the day care center. Such a fence is contrary to the other depictions on Exhibit 122.

E. To the extent that Exhibit 122 is portraying a parcel which is five feet longer in north-south dimension than the property included within both the legal description and the advertising for the application, such additional property cannot be made subject to the instant Conditional Use Permit. (The Examiner believes that the problem is a graphic depiction shortcoming rather than an actual attempt to indicate that the applicant owns five more feet of property than previously disclosed. It would frankly appear that the applicant simply lengthened the property in order to save redrafting costs associated with moving the proposed buildings five feet south on the site plan.)

6. The Snohomish Health District (SHD) has indicated that it has no objection to the proposed development provided that sanitary sewers and public water service are provided (Exhibit 98). The Alderwood Water District has indicated that both of said services are available (Exhibit 29). SCC 17.04.130 provides that Snohomish County will not issue a building permit where the "permit application indicates the need for waste disposal system work of any kind, . . . without

prior approval from the [SHD] for an approved means of waste disposal."

7. Title 24 SCC, the county drainage ordinance, requires that preparation of a detailed drainage plan be made a condition of the instant approval to be fulfilled prior to the initiation of any site work unless the Community Development Division (CDD) has expressly waived such a requirement. At the time the instant application was being initially reviewed by the County, the DPW was charged with the administration of Title 24 SCC. The DPW has indicated that a detailed drainage plan would be required prior to the initiation of any site work (Exhibit 101).

8. The DPW has recommended (Exhibits 62 and 101) that the applicant deed 10 feet of r/w along the property's frontage on Motor Place, 10 feet of r/w along the property's frontage on 13th Avenue W and 25 feet of r/w along the property's frontage on 164th Street SW. The DPW has also recommended that the applicant pay a proportionate share payment into the 164th Street MRIP in the amount of $17,556. The DPW has recommended that all of said conditions be fulfilled prior to building permit issuance. The applicant has offered to deed 10 feet of r/w along Motor Place and 13th Avenue W and 20 feet of r/w along 164th Street SW. The applicant has also offered to pay $17,556 into the 164th Street MRIP (Exhibit 87, sheet 5). The applicant's preferred site plan (Exhibit 122) revises the 164th Street SW r/w offer from 20 feet to 25 feet.

9. The DPW has recommended that the two existing driveways on 164th Street SW be abandoned and that a central "single access point to the parking lot on 164th Street (coordinated with the Public Works design section) [be provided] and that usage of this lot be restricted to vehicles generated by church building-related activities and church staff." (Exhibit 101)

CONCLUSIONS

1. The Examiner has authority to grant Conditional Use Permits and to impose conditions on such approvals pursuant to SCC 18.72.050 and .060. The Examiner has jurisdiction over the instant matter specifically by virtue of the County Council's remand of the Superior Court remand.

2. No challenge to the lead department's environmental determination was raised during the Examiner's hearing. The environmental evaluation and threshold determination made by the lead department constitutes, based upon the evidence in the record before the Examiner, adequate compliance with the State Environmental Policy Act. All evidence of environmental impact relating to the proposed action and reasonable alternatives to the proposed action have been considered by the Examiner. The determination that an Environmental Impact Statement does not need to be prepared does not mean that there are no adverse environmental impacts. The county has authority under the police power to mitigate identified impacts as deemed necessary to protect public health, safety and welfare.

3. When a Conditional Use Permit is approved which proposes the construction of facilities, a site plan is required. The site plan, upon approval, becomes a binding site plan for the development of the property. This Examiner cannot place his stamp and signature of approval on a site plan which does not meet minimum zoning, building and fire code standards as adopted by Snohomish County. This Examiner also cannot put his stamp of approval or signature on a site plan which directly conflicts with a previously approved binding site plan for another Conditional Use Permit.

4. The Superior Court in and for Snohomish County has required this County to approve a Conditional Use

Permit for the applicant's proposed "rest home". The Court has allowed the County to impose conditions of a "technical" nature so long as those conditions are supported by ascertainable County standards. Adopted regulations of the County constitute ascertainable standards.

5. The latest plan presented by the applicant (Exhibit 122) has apparently never been viewed by the Court. Exhibit 122 has never been part of the application reviewed by this Examiner or the County Council in any prior public hearing proceeding. Thus, Exhibit 122 is not part of the record of the application which was before the court. Nevertheless, the Examiner recognizes that the applicant has attempted on Exhibit 122 to constructively respond to certain of the previously identified deficiencies. The Examiner is thus willing to consider Exhibit 122 as the plan for which the applicant is seeking approval as the applicant has requested. The plan will have to be revised before it can be officially approved to the extent that Exhibit 122 contains elements which are inconsistent with adopted county code or which present concepts which have never previously been considered by the county through the application review process.

6. The denotion of "future underground parking" under the parking area on the south side of the building has never been considered in any previous proceeding involving the instant application. The site plan does not indicate how access would be obtained to that future underground parking area. Underground parking in that area is not necessary in order to meet county code requirements. In fact, there is more than adequate parking on the site plan as presented for a 77 unit retirement home. Underground parking could have environmental impacts which have never been considered. Approval of a site plan portraying something which has never previously been considered and for

which environmental review has never been performed would be inappropriate and contrary to the State Environmental Policy Act. Therefore, the first change that must be made before the site plan can be approved is the elimination of the two "future underground parking" indications.

7. The plan deficiencies which have been enumerated in Finding 5, above, must be corrected before the plan can be given Conditional Use Permit approval. Correction of those conflicts with County Code and elimination of the "future underground parking" indications will require physical redrafting and correction of the proposed site plan. Revision of the day care conditional use permit binding site plan must also occur so that the circulation systems will match. Since the Examiner has been directed by the Court to grant the applicant a Conditional Use Permit, the Examiner cannot return the application to the applicant for modification. The only process available to the Examiner is to grant the permit subject to fulfillment of certain stipulated preconditions within a specified time period. The preconditions would call for revision to the day care binding site plan and submittal of a revised site plan that would be consistent with the minimum standards of Snohomish County Code. A three month time period should be more than adequate for the applicant to fulfill the necessary preconditions. The Examiner wishes to point out that the shortcomings in Exhibit 122 are not fatal to the application, but are serious enough to require correction before the site plan is approved, and should be able to be fairly easily corrected.

8. Title 26B SCC (commonly known as the County Road Ordinance) requires certain actions by applicants dependent upon the computed Level of Service (LOS) of adjacent road systems. SCC 26B.52.030 authorizes the Council to adopt a Master Road Improvement Program

(MRIP) in cases where major road deficiencies are occurring [Subsection (1)] and provides that an MRIP, once adopted by the council, shall be employed in lieu of all other developer obligations under Title 26B SCC [Subsection (4)].

9. Regardless of the Level Of Service (LOS) that will exist on the defined road system following project development, the developer has an obligation "to perform frontage road improvements or dedicate additional right-of-way where required." [SCC 16B.55.020, .030(3), .040(8) and .050] Dedication of additional r/w is required "when to do so is necessary in the opinion of the [DPW], or following hearing by the county hearing body, for improvement, use or maintenance of the road system serving the proposed development." [SCC 26B.56.010]

10. The Council adopted an MRIP for "the 2.75-mile section of 164th Street [SW/SE] between the City of Mill Creek and 36th Avenue West" by Resolution 86-045 on May 5, 1986. Said road section "has recently experienced traffic deficiencies (unsafe conditions) of major proportions that have created public inconvenience and hazards" (164th MRIP, p. 2). The 164th Street MRIP identified required improvements, estimated improvement costs, established a separate per vehicle proportionate share for the east and west segments of the MRIP section, provided a trip generation chart and created a trip generation zone map, the latter of which supercedes the definition of "road system" in SCC 26B.51.080 (164th MRIP, pp. 3, 4, 5, 9, 12 and 13). The subject property fronts on the segment of 164th Street SW which is governed by the 164th Street MRIP and lies within the 100% contribution zone on the Trip Generation Zone Map.

11. "Any property owner [whose land lies within the 164th Street influence area as shown on the trip generation

zone map] may receive normal consideration . . . of . . . land use applications by signing a Voluntary Agreement for Mitigating Road Improvements" pursuant to the MRIP. The proportionate share must be paid to the county "prior to the issuance of building permits." (164th MRIP, p. 10) Property fronting on 164th Street is exempt from frontage improvements but is required to deed r/w pursuant to Title 26B SCC. Property fronting on other streets is not exempt from either deeding r/w or performing frontage improvements (164th MRIP, p. 11)

12. The applicant's offer (Exhibit 87), as amended by Exhibit 122, is consistent with the regulatory requirements of Title 26B SCC.

13. The timing and method of obligation fulfillment differs according to the type of permit or approval being sought and is stipulated in Chapter 26B.55 SCC. Generally speaking, obligations are to be imposed as a condition of preliminary plat approval for execution and/or fulfillment prior to plat recordation, are to be executed prior to the effective date of a rezone, are to be imposed as a condition on the issuance of a conditional or special use permit to be fulfilled or executed prior to building permit issuance or are to be executed and fulfilled prior to building permit issuance, whichever comes first [SCC 26B.55.030(2), .040(5), (6) and (7) and .050]. Council Motion 89-050 contains a misrepresentation of the requirements of Title 26B SCC to the extent that it implies that determination of developer obligation under the 164th Street MRIP does not have to occur until building permit issuance. Title 26B SCC requires that the determination of obligation be made prior to Conditional Use Permit approval, that the nature of the obligation be imposed as a condition on the issuance of the Conditional Use Permit and that the obligation be fulfilled prior to the issuance of a building permit. Appropriate conditions

will be imposed to effect the requirements of Title 26B SCC.

14. The applicant's proposed revision of the ingress/egress proposal onto 164th Street SW is supported by the record (Exhibit 101). This Examiner has previously stated that he would support the DPW recommendation regarding that ingress/egress (Exhibit 119, Conclusion 25). The applicant's portrayal of the revised access on Exhibit 122 is consistent with the guidance offered by the DPW in Exhibit 101.

15. The preparation of a detailed drainage plan prior to the initiation of site construction work will have to be imposed as a condition in order to comply with the regulatory requirements of Title 24 SCC.

16. The proposed rest home will have to be served by a public water and sewer system.

17. The Planning Division (PD) has recommended four preconditions and nine conditions in Exhibit 99. Preconditions 1, 3 and 4 have been met by Exhibit 122 as it now exists. Recommended Precondition number 2 (requiring that a five foot landscaped strip be provided along the edge of the new r/w as required by Chapter 18.43 SCC) has not been met. As far as the nine PD-recommended conditions are concerned, the Examiner concludes as follows:

    A. The Examiner will require the use of sanitary sewers. The Examiner has every reason to believe that the SHD will require the abandonment of the existing on site septic tank and drainfields.

    B. The concept of recording a covenant for the maintenance of the building and its surroundings is not supported by any ascertainable standards of Snohomish County. The concept of limiting occupancy of all units to not more than two persons per unit each of which must be over 60 years of age is not

supported by any ascertainable standard of county code. The concept of barring condominium conversion or individual sale/ownership of units is consistent with the Superior Court's decision that the proposed facility is a rest home. If the facility were condominiumized or individual units otherwise sold, the rest home concept would have been seriously violated. A condition will be imposed barring such conversion or sale.

C. The suggestion that all landscaping should be installed prior to final inspection and occupancy is contrary to the provision of SCC 18.43.020 which allows an applicant to post a bond for up to a 120 day delay in landscape planting where "planting season conflicts could produce a high probability of plant loss." The Examiner has previously ruled in two of his decisions on the instant application that the applicant is entitled to consideration under the zoning code as it existed at the time of the original application (see, for example, Exhibit 119, Finding 3). Nevertheless, since the present provision of SCC 18.43.020 is more generous than the prior provisions of county zoning regarding landscaping, the Examiner believes that it would be fitting and appropriate that the applicant be allowed to utilize the installation deferral process should planting season conflicts occur.

D. The concept of requiring the submittal of a revised landscape plan which would include berming up to the first residential floor elevation on the north side of the building is not supported by any ascertainable standard of Snohomish County.

E. The recommendation that the rest home be operated "in such a manner as to avoid significant adverse impacts upon adjoining properties, occupants and uses from noise, dust, glare, littering, loitering,

off-site parking, traffic, odors, vibration or smoke" is not supported by ascertainable standards of the County except in certain areas such as noise where Snohomish County has specific regulations with which the applicant must comply.

F. The recommendation that all utility services be underground is not supported by any ascertainable standard of Snohomish County. The applicant is certainly entitled to place utility services underground but the County, under the Superior Court Order, has no authority to require undergrounding.

G. The recommendation that refuse disposal storage and above-grade utility appurtenances be screened from view is not supported by ascertainable standards of the County.

H. The statement that no approval is expressed or implied for any land division of the property is not so much a condition as a simple statement of fact. It is certainly true that approval of the requested Conditional Use Permit by the county does not express or imply any approval for land subdivision. No condition need be imposed, however.

I. The recommendation that all "kitchen, kitchenette and wetbar facilities outside the cafeteria shall be eliminated from the project" is not supported by any ascertainable standard of Snohomish County. The Examiner has previously ruled that said condition would not be imposed on the permit if it were ultimately approved, given the Superior Court ruling in a previous case involving this application (Exhibit 116, Conclusion 4).

18. Historically, this Examiner has authorized the PD staff to administratively approve minor revisions to site plans for Conditional Use Permits which have been approved by the Hearing Examiner. The authority to

make such minor revisions provides a degree of flexibility which obviates the need to return for a public hearing whenever final building designs and other final development plans result in small but discernible changes in the building and the site layout. The Examiner acknowledges that there is not express authority for such delegation with respect to Conditional Use Permits contained within Title 18 SCC. However, authority for such delegation relating to Freeway Service Site Plans [SCC 18.56.040(A)] and Business Park, Planned Community Business and Industrial Park Site Plans [SCC 18.60.095] is contained within Title 18 SCC. Similar authority for minor administrative revisions is contained in SCC 19.20.020(1) with respect to approved preliminary plats. The Examiner believes that the delegation of such authority is a legitimate and legal action. Therefore, the Examiner's standard authorization for administrative approval of minor amendments will be placed on the Permit as a condition.

19. The issuance of a Conditional Use Permit does not constitute the issuance of a building permit, the approval of a detailed drainage plan, the issuance of fire code approval, or any other similar approval by the County or any other agency with regulatory control over the proposed rest home. The Examiner routinely imposes a condition on many permits reminding permittees of their obligation to comply with such other regulatory requirements. The placement of such a "reminder" condition on the instant permit is reasonable.

20. SCC 18.72.210 requires the recordation of a Land Use Permit Binder (LUPB) in conjunction with the issuance of any conditional use or special use permit or variance. The LUPB serves two principal functions: as an acknowledgement by the permittee that the terms and conditions of the permit have been read, are understood and will be fulfilled; and as a notice to any

potential purchaser of the property that a permit with special conditions does govern certain uses on the subject property.

21. Snohomish County Code provides a convenient mechanism by which review and/or adjustment of conditional use permits can occur. SCC 18.72.190 allows any person (including an applicant) to file a petition with the Examiner seeking a review hearing on an existing conditional use permit. The Examiner has discretion to call such a hearing. The Examiner has historically convened a review hearing whenever it appeared that there was probable cause to believe that either a permit condition was not being fulfilled properly, that a permit condition needed to be revised in order to be effective, or that a permit might even need to be revoked. That mechanism for review and "fine tuning" of this permit will be available just as it is for any other conditional use permit.

22. The Examiner intends, and has no knowledge or belief to the contrary, that the requirements, limitations and conditions imposed by the instant decision are only such as are lawful and within the authority of the Examiner to impose pursuant to Chapter 2.02 SCC and Titles 18, 24 and 26B SCC and the remand Order of the Superior Court in an for Snohomish County.

DISPOSITION

A Conditional Use Permit is GRANTED *but* shall become EFFECTIVE ONLY upon FULFILLMENT of the following PRECONDITION(S) not later than June 16, 1989:

1. The binding site plan for the day care addition (file ZA 8507179) shall have been officially revised to reflect the eastbound flow of traffic along the south side of the day care site. The Planning Division shall determine whether said revision can be approved administratively or whether a hearing will be necessary.

2. A revised site plan shall have been submitted to and approved by the Hearing Examiner. Said site plan shall be based upon Exhibit 122 but shall: eliminate the "future underground parking" notations; adjust the property dimensions and building placements so as to conform to the actual dimensions of the subject property; delete the six foot high cedar fence depicted across the egress to 13th Avenue W; delete the berm notation depicted as blocking the end of the emergency ingress easement from Motor Place; and correct all conflicts with county code as specifically enumerated in Finding 5, above.

The instant decision is binding but will not become effective until the above preconditions have been met and acknowledged by the Examiner on the original of the instant decision; PROVIDED, however, that if said precondition(s) are not fulfilled within the specified time period, this conditional approval shall be void and of no effect; PROVIDED FURTHER, that the Examiner may extend the time period for just cause shown if and only if a written request for such extension is received by the Examiner prior to the expiration of the original time period.

The Conditional Use Permit, once its approval becomes effective, shall be SUBJECT TO the following CONDITIONS:

A. The Land Use Permit Binder, enclosed herewith, shall have been recorded with the Snohomish County Auditor and a copy of said recorded document submitted to the Hearing Examiner's office for inclusion within the case record within forty-five (45) days of the effective date of the instant Permit.

B. The revised site plan as approved by the Hearing Examiner shall be the official site plan(s); any discrepancy between the content of the official site plan(s) and the performance standards of Title 18 SCC shall be re-

solved in favor of the standards contained within Title 18 SCC.

C. The instant approval is granted for a rest home containing a maximum of 77 units. No increase in the number of units may occur unless such increase is first approved through the Conditional Use Permit revision process set forth in SCC 18.72.190 as the same now exists or may hereafter be amended.

D. The Director of Planning and Community Development or his designee may authorize minor modifications to the approved plans so long as such modifications do not affect the impact of the development on surrounding properties or upon public right-of-way. Any such modification shall be appropriately documented in writing and included with the appropriate case record.

E. Prior to initiation of any further site work; and/or prior to issuance of any development/construction permits by the county:

i . Twenty-five feet of additional r/w along the subject property's frontage on 164th Street SW shall have been deeded to and accepted by Snohomish County.

ii . Ten feet of addition r/w along the property's frontage on Motor Place shall have been deeded to and accepted by Snohomish County.

iii. Ten feet of additional r/w along the property's frontage on 13th Avenue W shall have been deeded to and accepted by Snohomish County.

iv A proportionate share fee in the amount of $17,556 shall have been paid into the 164th Street MRIP fund.

v . A detailed drainage plan shall have been submitted and approved pursuant to Chapter 24.16 SCC.

vi . A grading permit issued pursuant to Title 17 SCC and Chapter 70 UBC shall have been obtained for

any on-site grading which is not expressly exempted by Section 7003 UBC.

F. All site development work shall comply with the requirements of:

i . The drainage plan approved pursuant to Chapter 24.12 SCC.

ii . The mandatory and special drainage requirements of Chapter 24.20 SCC.

iii. The approved grading permit (if required).

G. Prior to the occupancy of any portion of the rest home or prior to the issuance of a Certificate of Occupancy for the rest home, whichever comes first:

i . The site's driveway and circulation system shall have been revised to conform to the approved site plan, including without limitation, replacement of the two current drives on 164th Street SW with one central drive, elimination of the circulation lane south of the church building and construction of the egress drive along the south portion of the day care property to 13th Avenue W.

ii . The emergency vehicle access from Motor Place shall be usable.

iii. Public water and sewer service shall be available.

H. No sale of units in any fashion, including conversion to condominium ownership status, shall occur during the life of the instant Permit. The rest home facility shall remain in single ownership, which term shall not include a condominium owner's association.

I. Nothing in this permit/approval shall excuse the applicant, owner, lessee, agent, successor or assigns from full compliance with any other federal, state or local statutes, ordinances or regulations applicable to this project. In particular, no clearing, grading, filling, con-

struction or other physical alteration of the site may be undertaken prior to the issuance of the necessary permits for such activities by the county.

Decision issued this 15th day of March, 1989.

/s/ John E. Galt
John E. Galt, Hearing Examiner

*****NOTICE to PARTIES of RECORD*****

The above decision of the Hearing Examiner is final and conclusive with right of appeal to the County Council. The grounds for filing an appeal of an Examiner decision shall be limited to the following: a) newly discovered evidence which is material to the Examiner's decision and which could not reasonably have been produced at the Examiner's hearing; b) the Examiner exceeded his jurisdiction; c) the Examiner failed to follow the applicable procedure in reaching his decision; d) the Examiner committed an error of law or misinterpreted the applicable comprehensive plan, provisions of the Snohomish County Code, or other county or state law or regulation; or e) the Examiner's findings and conclusions are not supported by the record. Any such appeal shall be filed by the applicant, a department of the county, or other aggrieved person or agency with the Department of Planning and Community Development, 4th floor, County Administration Building, Everett, Washington 98201, within ten (10) calendar days following the rendering of the Examiner's decision. If the tenth day falls on a non-business day, the appeal period runs through the end of the next working day. All appeals shall be in writing, shall contain a detailed statement of the grounds for appeal and the facts upon which the appeal is based, and shall be accompanied by a fee of $50.00: Provided, that the fee will not be charged to a department of the county or to other than the first appellant. Please

use the county file number on all future correspondence with the county regarding this case. [SCC 2.02.170]

Mailed on March 15, 1989 to:

APPLICANT:

LUTHERAN DAY CARE

OTHER PARTIES OF RECORD:

Patti Bourgault	Ken Maffitt
Diane McClary	Loretta Bennett
Frances Mann	Sharon Dodds
James Allendoerfer	Alice Dawson
Leon Faurie	Amy Nopson
Erma Bueing	Jerry Bergsman
Wayne A. Hoskin	Donald Counsell
Richard H. Mullen	Louis Bratz
Mrs. George A. Patterson	Louise Portch
Wm. T. Kemper	Katie Greif
John C. Bangerter	Janice Belden
Frank Dalton	William W. Krause
Ray Glover	Helen Tutmark
R.A. Blaser	

OTHER PARTIES:

Planning Division	Community Development Division
Public Works	

ACKNOWLEDGEMENT OF FULFILLMENT OF PRECONDITIONS

The above imposed precondition(s) having been fulfilled by the applicant and/or his successors in interest, the Examiner hereby states that the instant Conditional Use Permit is effective as of the 16th day of October, 1989.

/s/ John E. Galt

John E. Galt, Hearing Examiner

APPENDIX M

[seal]
Snohomish County
County Council Office

Bill Brubaker
Peter Hurley
Ross Kane
Liz McLaughlin
Karen Miller

M/S #609
3000 Rockefeller Avenue
Everett, WA 98201
(206) 388-3494
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SCAN (206) 649-3494

CASE NO. ZA 8402028
LUTHERAN DAY CARE

OFFICIAL NOTICE OF SNOHOMISH COUNTY COUNCIL
(No. 89-050)
ENTERED: February 22, 1989

STATE OF WASHINGTON)
) ss.
County of Snohomish)

I, Sheila McCallister, Asst. Clerk of the Snohomish County Council, certify under penalty of perjury under the laws of the State of Washington that the attached document is a true and correct copy of Motion No. 89-050, approved by the Snohomish County Council, remanding the case of Lutheran Day Care, ZA 8402028, to the Snohomish County Hearing Examiner, now on file in the County Council Office.

/s/ Sheila McCallister

Signed at Everett, Washington, on

October 15, 1992

SNOHOMISH COUNTY COUNCIL
Snohomish County, Washington

MOTION NO 89-050

REMANDING THE CASE OF LUTHERAN DAY-CARE, ZA 8402028 TO THE SNOHOMISH COUNTY HEARING EXAMINER

WHEREAS, Snohomish County Superior Court Judge Daniel Kershner entered an order on February 9, 1989 on a writ of certiorari in the case of *Lutheran Day-Care v. Snohomish County*, ZA 8402028; and

WHEREAS, that order directs the Snohomish County Council to issue a conditional use permit with conditions consistent with the findings of the court for the operation of a 77 unit rest home on a parcel of property situated on the north side of 164th Street SW between Motor Place and 13th Avenue W; and

WHEREAS, after consulting with the Prosecuting Attorney's Office in Executive Session on this matter, it was the Council's determination to remand this matter to the Snohomish County Hearing Examiner for issuance of the conditional use permit, and inasmuch as the court ordered the immediate issuance of the permit the Council has determined that a public hearing is not necessary.

NOW, THEREFORE, ON MOTION:

The Snohomish County Council remands the case of *Lutheran Day-Care v. Snohomish County*, ZA 8402028, to the Snohomish County Hearing Examiner for immediate issuance of a conditional use permit with conditions to operate a rest home. The Department of Planning and Community Development should pay special condition to the impact of the 164th St. Master Road Improvement Program at the time of issuance of building permits.

Dated this 22nd day of February, 1989.

/s/ William H. Brubaker
Chairman

ATTEST:

/s/ Kathryn J. Morton
Clerk of the Council

SUPERIOR COURT OF WASHINGTON FOR SNOHOMISH COUNTY

NO. 86-2-06611-8

LUTHERAN DAY-CARE, a non-profit corporation,
Petitioner/Plaintiff,

vs.

SNOHOMISH COUNTY; THE SNOHOMISH COUNTY COUNCIL; and THE SNOHOMISH COUNTY HEARING EXAMINER,
Respondents/Defendants.

FILED

?Illegible? 1989

KAY D. ANDERSON
COUNTY CLERK
SNOHOMISH CO. WASH.

ORDER ON WRIT OF CERTIORARI

This matter came before the above-entitled court on July 29, 1988 upon a Writ of Certiorari challenging the decision of the Snohomish County Hearing Examiner, as affirmed by the Snohomish County Council, which denied Petitioner a Conditional Use Permit for the construction of a rest home on property located at 1415-164th Street S.W., Lynnwood, Washington. The Petitioner was represented by and through its attorney James H. Allendoerfer, and the Respondents were represented by and through Deputy Prosecuting Attorney Carol J. Weibel. The Court considered a transcript of the records and the proceedings in this case consisting of the following:

1. All written documents and exhibits in Conditional Use Permit File No. ZA 8402028, including the decision of the Hearing Examiner dated November 24, 1986 and the decision of the Snohomish County Council dated December 24, 1986.

2. A transcription of all testimony and proceedings which occurred at the public hearings before the Hearing Examiner on June 18, 1985 and November 4, 1986, and before the Snohomish County Council on August 7, 1985.

3. A supplemental record of written documents and exhibits in File No. ZA 860162 relating to a variance issued to the Atlantic Richfield Company for property abutting the subject property.

On September 7, 1988 this court issued a Memorandum Decision stating, in part, as follows:

> There is no clear factual basis, set forth in the record, for the conclusions upon which the Hearing Examiner's decision rests, nor is there reference to standards, if any, that support the Examiner's decision. Therefore, the decision of the Hearing Examiner denying the Petitioner's Conditional Use Permit is remanded for further proceedings, to wit: the entry of detailed findings of fact setting forth specific references to the record that support those findings which are the basis for the Examiner's decision and further; that any standards considered in the conclusions that are reached be clearly defined.
>
> This court will maintain jurisdiction for the purpose of resolving any further issues that may arise.

On November 2, 1988 the Hearing Examiner issued an Order providing Supplemental Findings of Fact and Conclusions on ZA 8402028. On January 6, 1989 the court reviewed the files and records herein and considered the argument of counsel; on Februaary 3, 1989 the court con-

sidered further argument of counsel including proposed drafts of a court order to be entered herein.

The court hereby finds that the Hearing Examiner's Order, even as supplemented, is not supported by the evidence in the record and is not based upon ascertainable standards. The three reasons stated by the Hearing Examiner for denying the Conditional Use Permit, are as follows:

> 1. The internal circulation system on the site is not effective and would not serve the public use and interest. The circulation plan is simply not desirable as access to a major activity on the subject property;
>
> 2. The bulk of the structure and its proximity to property lines would be incompatible with single-family residential uses that might now exist or may occur on abutting parcels; and
>
> 3. The site is not large enough for the proposed rest home when the same site already has a church and day care center. It is simply too intense a use for the subject property. Moreoever, the number of occupants in the proposed rest home would result in a residential density which would be substantially incompatible with the zoning classification of the subject property and with the present and permitted uses on abutting residential properties.

These findings and conclusions by the Hearing Examiner constitute wilful and unreasonable action without consideration and in disregard of the relevant facts and circumstances. The denial of the Conditional Use Permit on these grounds is arbitrary, capricious and unlawful. This Court finds that the internal circulation system, the bulk and dimensional elements of the project, the site plan, and the density of development, as proposed by the Petitioner, are reasonable and acceptable based upon the evidence in the

record and upon the ascertainable standards of Snohomish County.

NOW, THEREFORE, the Court hereby enters the following Order:

1. This case is remanded to the Snohomish County Council for the immediate issuance of a Conditional Use Permit for the rest home project as proposed by the Petitioner. Reasonable conditions of a technical nature may be imposed on the project provided that the same are based upon evidence in the record and upon ascertainable standards. No conditions may be imposed which would be inconsistent with the findings of this Court.

2. This Court shall retain jurisdiction over this matter for the purpose of resolving any further issues which may arise.

3. The Petitioner is hereby awarded judgment against Snohomish County for statutory attorney's fees and taxable costs as stated in the Petitioner's Cost Bill dated September 21, 1988.

DONE IN OPEN COURT this 9th day of February, 1989.

/s/ DANIEL T. KERSHNER
DANIEL T. KERSHNER, Judge

Presented by:

/s/ James H. Allendoerfer
JAMES H. ALLENDOERFER
Attorney for Petitioner

Copy Received; Notice of
Presentation Waived:

/s/ Carol J. Weibel
CAROL J. WEIBEL
Deputy Prosecuting Attorney

APPENDIX N

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

NO. 18884-4-1
DIVISION ONE
FILED FEB 29 1988

LUTHERAN DAY-CARE, a non-profit corporation,
Respondent,

v.

SNOHOMISH COUNTY; the SNOHOMISH COUNTY COUNCIL; and the SNOHOMISH COUNTY HEARING EXAMINER,
Appellants.

FILE
IN CLERKS OFFICE
COURT OF APPEALS
STATE OF WASHINGTON-DIVISION I
DATE FEB 29 1988
/s/ Scholfield, J.
CHIEF JUDGE

SWANSON, J.—Snohomish County, the Snohomish County Council, and the Snohomish County Hearing Examiner appeal from a judgment reversing the decision of both the hearing examiner and the county council. Appellants contend that the trial court erred in holding that the facility proposed by Lutheran Day-Care was a "rest home" under the Snohomish County Zoning Code and was therefore an allowable use in the single-family residential zone. We disagree and affirm.

Respondent Lutheran Day-Care applied for a conditional use permit to construct a 77-unit retirement center in a single-family residential zone in Snohomish County. The Snohomish County Department of Planning and Community Development made a staff recommendation that the permit be granted with conditions.[1] On the basis of this staff determination, Lutheran Day-Care restructured its proposal and submitted it to the hearing examiner for approval. On July 3, 1985, the hearing examiner denied the project, concluding that the facility did not qualify as a "rest home" under the zoning code, but that instead it was more like a multiple-family dwelling, which was allowable only in a higher density zone. On August 7, 1985, the Snohomish County Council affirmed the decision of the hearing examiner.

Lutheran Day-Care appealed to the Superior Court, which held on July 1, 1986, that the proposed facility constituted a "rest home" and was therefore an allowed use in the single-family residential zone. From this decision follows the appeal.

The Snohomish County Zoning Code (SCC)[2] section 18.18.030 enumerates 24 conditional uses that are allowed in the single-family residential zone subject to the issuance of a permit. SCC 18.18.030(7) provides for "hospitals, sanitariums, and rest homes . . ." SCC 18.08.540 defines "sanitarium and/or rest home" as

> a structure and/or premises for nursing, dietary care and other personal services rendered to con-

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[1] The conditions placed on the project were as follows: (1) that the facility include an institutional kitchen and cafeteria serving all residents; (2) that no dwelling units be equipped with a full kitchen or dining room; and (3) that the facility remain in the onwership of a nonprofit corporation without the possibility of sale of individual dwelling units to the residents. CP Vol. III-IV, p. 76.

[2] Snohomish County Zoning Ordinance Number VIII. (Res. adopted September 15, 1975: two of Res. adopted January 31, 1966).

> valescents, invalids and aged persons, but excluding contagious, communicable, or mental disease cases and surgery or primary treatments such as are customarily provided in hospitals.

The central issue on appeal is whether respondent's proposed facility is a "rest home" as defined in SCC 18.08.540. The standard of review of zoning actions is whether the action was "'arbitrary, capricious, or contrary to law.'" *Mall, Inc. v. Seattle*, 108 Wn.2d 369, 374, 739 P.2d 660 (1987); *see* RCW 7.16.120. The facts being undisputed, this appeal involves an issue of law only, the correct interpretation of terms in the Snohomish County Zoning Code. We review de novo the record of the administrative hearing. *Mall, supra* at 374; *Murphy v. Seattle*, 32 Wn. App. 386, 390, 647 P.2d 540 (1982).

Appellants argue that respondent's proposed facility does not fit the Snohomish County Zoning Code definition of "rest home." Respondent proposes to build a three-story, 77-unit center which requires an entry fee for an apartment of lifetime use. An additional monthly fee provides for one major meal per day, with two other meals available at a reduced rate. Also included are maid service, maintenance, transportation, recreational activities and a nurse to be on duty 24 hours a day. The entry age is 60-62 and the person must be mobile and able to care for him/herself. When required, a resident will receive three months of nursing care as part of the entry fee. If more care is needed, the resident must move out.[3]

Appellants maintain that standard rules of statutory construction resolve the issue in their favor. In the construction of zoning ordinances, the primary object is to

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[3] This description of the proposed retirement center was provided by Lutheran Day-Care in their advertising brochure which was likewise presented to the hearing examiner for consideration. CP Vol. III-IV, p. 265.

determine the legislative intention. *Strenge v. Clarke*, 89 Wn.2d 23, 29, 569 P.2d 60 (1977). Zoning ordinances are to be liberally and reasonably construed so as to effectuate their intent and purpose. *Wiggers v. Skagit Cy.*, 23 Wn. App. 207, 212, 596 P.2d 1345 (1979); *Mall, supra* at 378. Any ambiguity in a zoning ordinance, however, is to be strictly construed in favor of property owners. *Morin v. Johnson*, 49 Wn.2d 275, 279, 300 P.2d 569 (1956); *Mall, supra* at 378.

Both parties rely on the well-established rule that the construction placed upon a statute by an administrative agency charged with its administration and enforcement, while not controlling, should be given great weight in determining legislative intent. *Hama Hama v. Shorelines Hearing Bd.*, 85 Wn.2d 441, 448, 536 P.2d 157 (1975); *Mall, supra* at 377-78. In ascertaining the legislative intention, appellants urge us to place considerable weight on the interpretation of the hearing examiner and county council. Respondent, on the other hand, argues that the interpretation of the Department of Planning and Community Development should be accorded this deference.

Appellants rely on *Seattle-First Nat'l Bank v. Snell*, 29 Wn. App. 500, 629 P.2d 454 (1981). In *Snell*, we reversed the lower court and reinstated the hearing examiner's decision that the proposed facility, a drive-in bank, did not qualify as a permitted use in the applicable zone even though the administrative officer charged with the daily implementation of the zoning code had reached a different conclusion. We found it significant that the official's decisions were appealable to the hearing examiner, whose decisions were final.

Despite the *Snell* court's reliance upon the fact that the administrative official's decisions were appealable to the hearing examiner, we find it significant that it was not fully emphasized there that the purpose of the doctrine of judicial deference is to acknowledge and utilize the ex-

perience and expertise of the administrative officials who are most closely and regularly called upon to publicly interpret the legislation. *See Hama Hama v. Shorelines Hearings Bd.*, *supra* at 448.

Although the hearing examiner in the instant case has the authority to hear and decide appeals from any order, requirement, permit, decision or determination made by the director of the department of community affairs or his designees, SCC 18.88.090, it is the director of the department of community affairs who is authorized to administer and enforce the provisions of the code on a routine basis and who customarily interprets the code provisions to the public. SCC 18.96.010. Consequently, because of the division of responsibility for the interpretation of the legislation in this case, we decline to defer to either the hearing examiner or to the Department of Planning and Community Development in our analysis.

Next, appellants seek to employ the use of the Snohomish County Reformatted Zoning Code[4] as an aid to interpreting the legislative intent of the term "rest home." It is appropriate to consider an amendment to the act being interpreted when that amendment is tantamount to a legislative declaration of the statute. *See Ridder v. Department of Rev.*, 43 Wn. App. 21, 29, 714 P.2d 717 (1986). Appellants assert that the code has clarified the meaning of the term "sanitarium and/or rest home" by replacing it with "nursing home."

The change in the title of SCC 18.08.540 from "rest home" to "nursing home" is not helpful for our analysis because the definition itself remained the same. Moreover, the evidence presented by appellants regarding the amendment, will not be considered by this court because it was

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[4] Determination of Non-Significance, Reformat Title 18, Snohomish County Zoning Code, December 2, 1985. The date of enactment, July 1, 1986, coincided with the last day of trial in this matter.

not part of the record below. In fact, it was the appellants who objected successfully to respondent's attempt to introduce this evidence to the trial court. Cases on appeal will be decided only from the record. *State v. Wilson*, 75 Wn.2d 329, 332, 450 P.2d 971 (1969).

Appellants also urge that the facility must supply nursing services according to SCC 18.08.540 and must therefore be licensed as a "nursing home" according to RCW 18.51.030. This contention is irrelevant to the resolution of this case. Furthermore, whether a particular application of property is one permitted within the terms of a zoning code is determined on the basis of the actual use of the property, *cf. State v. Bellingham*, 25 Wn. App. 33, 36, 605 P.2d 788 (1979), not whether the proposed facility must be licensed or which term is used to describe the proposed facility.

Appellants contend that respondent's proposed facility does not meet the definition of "rest home" because it does not provide "nursing, dietary care and other personal services" to "convalescents, invalids and aged persons," critical aspects of the definition. Appellants assert that respondent's requirements that a resident be "mobile" and "able to care for him/herself" excludes a convalescent or invalid from the facility.

Absent evidence of contrary legislative intent, words used in an ordinance but not defined are construed according to their usual and ordinary meaning. *Department of Fisheries v. Chelan Cy. PUD I*, 91 Wn.2d 378, 383, 588 P.2d 1146 (1979). Resort to dictionary definitions is commonplace. *Department of Fisheries*, *supra* at 383. Webster's Third New International Dictionary (1969) defines "convalescent" as follows: "recovering from sickness or debility." Webster's at 497. An "invalid" is "one who is sickly or disabled." Webster's, at 1188.

It cannot be said that one who is "sickly or disabled" or "recovering from sickness or debility" cannot care for

himself or herself, and is necessarily immobile. Even convalescents or invalids confined to a wheelchair may still be considered mobile. In fact, the proposed facility is designed to accommodate wheelchairs.

It is evident that nursing, dietary care and other personal services will be provided to the residents. A nurse will be available 24 hours a day and if required three months of nursing care will be provided. Although respondent has not suggested that a dietician will be on the facility, we are persuaded that the availability of three meals per day satisfies the dietary care element. As for the "other personal services" element in the definition, maid service, maintenance, transportation, and recreational and religious activities described in respondent's proposal fulfills this requirement.

In sum, we find that the hearing examiner's decision was contrary to law and that the trial court correctly concluded that the proposed 77-unit retirement facility is an allowable use under SCC 18.08.540. In construing the language of the ordinance, we find that respondent's proposed facility falls within the definition of "rest home."

The judgment is affirmed.

/s/ Swanson, J.

WE CONCUR:

/s/ Scholfield, J.

/s/ Pekelis, J.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, IT IS SO ORDERED.

/s/ Scholfield, J.
CHIEF JUDGE

APPENDIX O

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH**

NO. 85-2-03274-6

LUTHERAN DAY-CARE, a non-profit corporation,
Plaintiff,

vs.

SNOHOMISH COUNTY; the SNOHOMISH COUNTY COUNCIL; and the SNOHOMISH COUNTY HEARING EXAMINER,
Defendant(s).

**FILED
JUL 24 1986
KAY D. ANDERSON
COUNTY CLERK
SNOHOMISH CO. WASH.**

NOTICE OF APPEAL TO DIVISION I OF THE COURT OF APPEALS

SNOHOMISH COUNTY; the SNOHOMISH COUNTY COUNCIL; and the SNOHOMISH COUNTY HEARING EXAMINER, the defendants herein, seek review by the designated appellate court of the Judgment entered herein on July 1, 1986.

Dated this 24th day of July, 1986.

SETH R, DAWSON
Prosecuting Attorney

By /s/Carol J.Weibel
CAROL J. WEIBEL
Deputy Prosecuting Attorney
Attorney for Defendants

Attorney for Appellants:

Carol J. Weibel
Deputy Prosecuting Attorney
3000 Rockefeller
Everett, WA 98201
259-9333

Attorney for Plaintiff:

James H. Allendoerfer
Allendoefer & Keithly
21 Avenue A
Snohomish, WA 98290
568-3119

APPENDIX P

IN THE SUPERIOR COURT
FOR SNOHOMISH COUNTY, WASHINGTON

NO. 85-2-03274-6

LUTHERAN DAY-CARE, a nonprofit corporation,

Petitioner,

vs.

SNOHOMISH COUNTY; THE SNOHOMISH COUNTY COUNCIL; and THE SNOHOMISH COUNTY HEARING EXAMINER,

Respondents.

FILED
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JUDGMENT

THIS MATTER came before the Court on April 14, 1986, upon a Writ of Certiorari challenging the decision of the SNOHOMISH COUNTY HEARING EXAMINER, as affirmed by the SNOHOMISH COUNTY COUNCIL, which denied the Petitioner a Conditional Use Permit for the construction of a rest home on property located at 1415-164th Street S.W., Lynnwood, Washington. The Petitioner was represented by and through its attorney, JAMES H. ALLENDOERFER, and the Respondents were represented by and through Deputy Prosecuting Attorney CAROL J. WEIBEL. The Court considered a transcript of the records and proceedings in this case consisting of the following:

1. All written documents and exhibits in file no. ZA 8402028, including the decision of the HEARING EXAMINER dated July 3, 1985, and the decision of the Snohomish County Council dated August 7, 1985.

2. A transcription of all testimony and proceedings which occurred at the public hearing before the HEARING EXAMINER on July 18, 1985.

3. A transcription of all testimony and proceedings which occurred at the public meeting before the SNOHOMISH COUNTY COUNCIL on August 7, 1985.

NOW, THEREFORE, being fully advised in the premises, the Court hereby enters the following Order:

1. The retirement center which the Petitioner proposes to construct constitutes a "rest home" as defined in the Snohomish County Zoning Code, and is an allowed use (with a Conditional Use Permit) in the Single-Family Residential zoning classification. The determinations to the contrary which have been entered by the SNOHOMISH COUNTY HEARING EXAMINER and the SNOHOMISH COUNTY COUNCIL are erroneous as a matter of law and are hereby REVERSED.

2. The Petitioner's application for a Conditional Use Permit is hereby remanded to the SNOHOMISH COUNTY HEARING EXAMINER for a new hearing on the merits of the case.

3. The Petitioner is hereby awarded judgment against SNOHOMISH COUNTY for taxable costs and statutory attorney's fees.

DONE IN OPEN COURT this 1st day of July, 1986.

/s/ J. A. Thibodeau
JUDGE JOSEPH A. THIBODEAU

Presented by:
ALLENDOERFER & KEITHLY, INC., P.S.

By /s/ James H. Allendoerfer

JAMES H. ALLENDOERFER
Attorney for Petitioner

Copy Received and Notice of Presentation Waived:

By _____
CAROL J. WEIBEL
Deputy Prosecuting Attorney
for SNOHOMISH COUNTY

APPENDIX Q

IN THE
SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

NO. 85-2-03274-6

LUTHERAN DAY-CARE, a non-profit corporation,

Plaintiff,

vs.

SNOHOMISH COUNTY; the SNOHOMISH COUNTY COUNCIL; and the SNOHOMISH COUNTY HEARING EXAMINER,

Defendant(s).

ORDER FOR ISSUANCE OF WRIT

This matter having come on regularly for hearing upon the application of Lutheran Day Care, and affidavit in support thereof, for a Writ of Certiorari directed to Snohomish County; Snohomish County Council; and Snohomish County Hearing Examiner requiring said Council and Hearing Examiner to certify to this court a transcript and record of the proceedings had by each in Conditional Use Permit No. ZA8402028 upon the grounds stated in said affidavit items numbered 6, 8, and 9 and in particular item number 6:

> On July 3, 1985, the HEARING EXAMINER ruled, in Conclusion No. 22, that the proposed facility was not a rest home, but instead was a boarding house or multiple-family dwelling. Because of this conclusion, he denied the conditional use permit.

and it appearing to the court that this is a proper cause for the issuance of such a writ, Now, Therefore,

IT IS HEREBY ORDERED that a Writ of Certiorari issue out of and under the seal of this court directed to Snohomish County Council and Snohomish County Hearing Examiner commanding each forthwith to certify fully and return to this court at the office of the clerk thereof, on or before the 26th day of November, 1985, a full and complete transcript of the following portion of the records and proceedings in said cause: entire record of Council of August 7, 1985 and entire record of Hearing Examiner of June 18, 1985 that the same be reviewed by this court as to said claim by petitioner that said proceedings and decision in said cause were contrary to law.

1. That on, or before the return date above designated, the parties shall agree in writing to a briefing schedule and file a copy of same with the court;

2. That upon the filing of the final brief in the case, either party may move for preassignment to a trial department for hearing.

DONE IN OPEN COURT this 26th day of September, 1985.

/s/ Daniel T. Kershner
SUPERIOR COURT JUDGE

Presented by:

/s/ Carol J. Weibel
CAROL J. WEIBEL
Deputy Prosecuting Attorney
Attorney for Defendants

Copy Received; Notice
of Presentation Waived:

/s/ James H. Allendoerfer
JAMES H. ALLENDOERFER
Attorney for Plaintiff

APPENDIX R

[seal]
Snohomish County
County Council Office

Bill Brubaker
Peter Hurley
Ross Kane
Liz McLaughlin
Karen Miller

M/S #609
3000 Rockefeller Avenue
Everett, WA 98201
(206) 388-3494
FAX (206) 388-3496
SCAN (206) 649-3494

CASE NO. ZA 8402028
LUTHERAN DAY CARE

OFFICIAL NOTICE OF SNOHOMISH COUNTY COUNCIL DECISION

ENTERED: August 7, 1985

STATE OF WASHINGTON)
) ss.
County of Snohomish)

I, Sheila McCallister, Asst. Clerk of the Snohomish County Council, certify under penalty of perjury under the laws of the State of Washington that the attached document is a true and correct copy of the Decision of County Council affirming the July 3, 1985 decision of the County Hearing Examiner in the case of Lutheran Day Care, ZA 8402028, now on file in the County Council Office.

/s/Sheila McCallister

Signed at Everett, Washington, on

October 15, 1992

SNOHOMISH COUNTY COUNCIL
SNOHOMISH COUNTY, WASHINGTON

SNOHOMISH COUNTY COUNCIL
EXHIBIT #85
FILE Lutheran Day-Care

OFFICIAL NOTICE OF COUNCIL DECISION

In re the case of: The appeal from the Hearing Examiner's decision in the case of LUTHERAN DAY-CARE (A NON-PROFIT CORPORATION), ZA 8402028, requesting a conditional use permit to establish a rest (retirement) home (SCC 18.18.030(7)).

NOTICE IS HEREBY GIVEN, that on August 7, 1985 the following decision in this matter was entered by the Snohomish County Council:

On unanimous vote, the July 3, 1985 decision of the Hearing Examiner was upheld.

FURTHER NOTICE IS GIVEN that any aggrieved party wishing to appeal this decision must do so by commencing said appeal in Snohomish County Superior Court, Everett, Washington no later than September 6, 1985 (SCC 2.02.190). If a judicial appeal of State Environmental Policy Act issues is to be brought, a Notice of Intent must be filed with the Clerk of the Council prior to September 6, 1985 (SCC 23.40.040(4)).

Dated this 7th day of August, 1985.

SNOHOMISH COUNTY COUNCIL
/s/ Kathryn J. Morton
Clerk of the Council

APPENDIX S

[SEAL]
Snohomish County
Hearing Examiner's Office

John E. Galt
Hearing Examiner
Peter T. Donahue
Deputy

M/S #405
3000 Rockefeller Ave.
Everett, WQA 98201
(206) 388-3538

CERTIFICATION OF THE:

DECISION OF THE HEARING EXAMINER
REVISED AFTER RESUBMITTAL
ENTERED JULY 3, 1985

APPLICANT NAME: LUTHERAN DAY CARE

CASE NO.: ZA 840208

STATE OF WASHINGTON)
) ss
COUNTY OF SNOHOMISH)

I, Mary Kurke, Clerk of the Hearing Examiner for the Snohomish County Hearing Examiner, certify under penalty of perjury under the laws of the State of Washington that the attached document is a true and correct copy of the original Decision of the Hearing Examiner dated July 3, 1985 under county file number ZA 8402028 and now on file in the Hearing Examiner's Office.

/s/ Mary Kurke
Signed at Everett, Washington on
October 15, 1992

Office of the
HEARING EXAMINER
Snohomish County, Washington

DECISION of the HEARING EXAMINER

REVISED AFTER RESUBMITTAL

PART I: SUMMARY INFORMATION

APPLICANT: LUTHERAN DAY-CARE (A NON-PROFIT CORPORATION)

FILE NO.: ZA 8402028

REFERENCE TAX ACCOUNT NUMBER: 3737-008-007-0513

TYPE OF REQUEST: Conditional use permit to establish a rest (retirement) home [SCC 18.18.030(7)].

SUMMARY OF REQUEST:

Location: The subject property is located on the north side of 164th Street SW, extending from Motor Place on the west to 13th Avenue W (Meadow Road) on the east, west of Martha Lake.

Section 2, Township 27N, Range 4E, W.M.

Comprehensive Plan - Area: North Creek
Designation: Freeway Service

Acreage: 4.89 acres

Zoning: RR 9600

Utilities - Water: Alderwood Water District
Sewage: Alderwood Water District

School District: Edmonds

Fire District: No. 1

SEPA COMPLIANCE: Determination of Nonsignificance issued by the lead department.

PROCEDURAL BACKGROUND:

1. The Examiner viewed the subject property and its surroundings on May 14, 1984.
2. The Examiner held a public hearings on the subject application on May 15 and December 20, 1984 and February 7, 1985.
3. The Examiner issued a decision on February 22, 1985 in which the application was returned to the applicant "for compliance with Title 26B and reevaluation of SEPA threshold determination" (Exhibit 56).
4. The applicant reactivated the application on or about May 14, 1985 (Exhibit 59). A public hearing was held on the reactivated application on June 18, 1985.

SELECTED AGENCY RECOMMENDATIONS (ABBREVIATED):

Department of:
Community and Educational Services: No comment received
Planning and Community Development:
Development Division: No objection
Planning Division: Approve with conditions
Public Works: Approve with conditions
Snohomish Health District: No comment received

HEARING EXAMINER DECISION (SUMMARY):
Deny

PART II: FINDINGS OF FACT

The Examiner, having viewed the property, weighed the evidence presented and heard the testimony of the parties, makes the following Findings of Fact:

1. The subject property lies within the North Creek Planning Area in which the currently valid comprehensive

land use plan became effective on May 25, 1977. The subject property is designated Freeway Service on said Plan. Freeway Service zoning exists to the west and Neighborhood Business zoning exists to the east of the subject property along 164th Street SW to a depth of approximately 150 feet from the edge of the public street r/w. The remainder of the property to the west, north and east of the subject property is zoned RR 9600 as is the entirety of the subject property.

2. The subject property presently contains two separate uses and the instant application proposes a third:

A. In or around 1966 the Shepherd of the Lake Lutheran Church was established on the subject property. In 1979 a conditional use permit was issued by the then Zoning Adjustor to allow expansion of the church. The expansion as approved contemplated three phases: a northward expansion of approximately 1,700 square feet on the existing building, a new 5,000 square foot multi-purpose room to the west of the existing building and a new sanctuary facility at the north end of the site. Only the first phase has ever been constructed (Exhibit 39). Church membership now consists of approximately 120 families (Exhibit 67).

B. A day-care facility was established 10 or 11 years ago on the subject property. (The applicant states in Exhibit 59 that the facility has been in operation for 10 years; literature published by the applicant in the spring of 1985 states that the facility has been in operation for 11 years (Exhibit 67).) The day-care facility is owned and operated by Lutheran Day Care which is a non-profit corporation. (Lutheran Day Care also has title to

the entire property, including the portion under the church (Exhibit 51).) In 1978 the then Zoning Adjustor granted a conditional use permit to expand the day-care facility by the addition of two wings onto a building which has frontage on Meadow Road (Exhibit 40). The expansion which was thus authorized has occurred. In addition, two commercial coaches have been placed just to the north of the church building apparently for classroom and/or other uses. There is also a classroom/play structure located just east of the church building. The day-care facility operates eight preschool classes each day and two kindergarten classes. The facility serves somewhat in excess of 2,000 families. There are 55 employees on the site at the present time. Exhibit 14 fairly accurately portrays the subject property as it now exists with the sole exception that the "meeting room" shown located just east of the south end of the church no longer exists. A custodian's house is located as shown on Exhibit 14.

C. The applicant proposes to construct a three story, 77 unit retirement home on the north portion of the property.

3. The retirement home proposal has undergone a series of significant changes since its initial submittal:

A. As originally submitted on February 8, 1984 the application sought approval for an 80 unit retirement facility to be constructed in a three story building along the north edge of the subject property (Exhibits 1 and 3). The basic dimensions of the structure were 336' x 68'. A double laned carport structure was to be provided immediately south of the main build-

ing and a "future multi-purpose education" building containing 6,400 square feet per floor was indicated between the retirement building and the existing church. Three of the buildings involved in the day-care operation (the two commercial coaches and the building just east of the church) would have been eliminated. A proposed restaurant site was reserved just west of the existing church (where the approved 5,000 square foot church building would go). Access to 164th Street SW, Motor Place and 13th Avenue W was contemplated.

B. The Planning Division (PD) of the Department of Planning and Community Development informed the applicant by letter dated February 22, 1984 that the level of detail in the application was inadequate to allow proper processing. The applicant was requested to provide additional information (Exhibit 4).

C. At some time after March 15, 1984 the applicant submitted a revised site and building plan (Exhibit 5) which contemplated a total of 77 "living units", 36 of which would be one bedroom, 41 of which would be studio or bachelor units. The main building had been reduced in size to 272'x68', the carport structure had been eliminated and the "future" building was then shown as an integral part of the facility providing the kitchen and dining space for the development. The site for the proposed future restaurant remained.

D. On May 7, 1984 the PD issued its Declaration of Nonsignificance (Exhibit 7) based upon the environmental checklist submitted with the

original application and the then current site plan.

E. Both the PD (Exhibit 9) and the applicant (Exhibit 10) requested a continuation of the hearing which was originally scheduled for May 15, 1984. The reason for the continuance was "to allow for more coordination with Public Works on traffic, circulation and access issues." (Exhibit 10)

F. The hearing on May 15th was convened and the application was continued indefinitely, to be heard not later than May 14, 1985.

G. On May 14, 1984 the applicant submitted a detailed textual statement regarding the nature of the proposed facility (Exhibit 11). Said statement describes the kitchen and dining facilities (which would be shared with the day-care center), indicates that cooking facilities would not be provided in individual units but that two kitchenettes would be provided on each residential floor and that each floor would also contain a lounge and non-commercial laundry. An administration office and nurse's office would be located on the first floor. Parking was provided at the ratio of 1.25 stalls per living unit.

H. On June 7, 1984 the PD received a copy of a letter which provided information regarding the ownership of automobiles by residents of three retirement centers in the state of Washington. The letter indicates that the auto ownership ratio in those centers is substantially less than one car per resident (Exhibit 20).

I. On June 12, 1984 the applicant's architect provided information regarding parking require-

ments of various municipalities for retirement housing projects. The ratios ranged from 0.5-0.75 stalls per living unit (Exhibit 22).

J. The application was revised from a 77 unit facility to a 122 unit facility by a letter and revised site plan received by the PD on August 27, 1984 (Exhibits 24 and 23). Inherent in the revision was a reduction in the parking stall ratio: the revised site plan contemplated 106 parking stalls for the 122 living units. The letter estimated that vehicle trip generation would be three trips per unit per day. The additional units were incorporated into the site plan by adding an L-shaped wing to the west end of the prior building.

K. On November 20, 1984 a further set of building plans was submitted (Exhibit 27).

L. On December 13, 1984 the PD issued a memorandum which was submitted to the Examiner's office on the following date which stated that the applicant had "requested a continuance of this item to amend the Conditional Use Permit application, file a Variance for parking and further resolve Title 26B issues related to this application." (Exhibit 31) (It should be noted that a hearing had been set by the staff and the applicant for December 20th.)

M. At some time between the 13th and the 18th of December, the PD found out that the applicant did not want a continuance of the hearing. The PD thus issued a recommendation for approval on the 18th of December predicated upon the second site plan version: the one with 77 living units (Exhibit 32).

N. On December 20, 1984, the Examiner convened the scheduled hearing and took testimony from several parties solely regarding the issue of whether or not the hearing should be continued. The testimony indicated that the PD staff had called key neighborhood leaders on or shortly after December 13th informing them that the hearing was not going to be held and that the neighborhood leaders had then called citizens in the area to inform them that they need not attend the hearing on the 20th. Testimony also indicated that the neighborhood learned that the hearing was not going to be cancelled only a day or two before the 20th. A memorandum was also submitted into the record indicating that the PD staff person who had been handling the application for the staff had been subpeoned to appear in King County Superior Court at the same time that the hearing was scheduled (Exhibit 36). The Examiner postponed any further consideration of the application until February 7, 1985 due to the confusion on the public notice, the confusion in the Examiner's mind at that time regarding the precise size and nature of the application and the inability of a key staff person to be present.

O. A public hearing was held on February 7, 1985. A slightly revised set of plans were submitted (Exhibit 52). The major change from Exhibits 23 and 27 was the elimination of the notation regarding the future restaurant. The area previously identified for a future restaurant is now labelled "existing interim church & employee parking".

P. There have been no changes to the proposed site development plan since the submittal of Exhibit 52.

4. The current proposal (Exhibit 52) contains 77 living units on three floors. There are 36 one bedroom, 650 square foot living units and 41 bachelor/studio, 490 square foot units. Both of the unit types contain full baths, individual hot water heaters, closet space, a wet bar with undercounter refrigerator and a deck/lanai. A kitchenette is located near the end of each floor with a communal laundry facility near the center of each floor. In addition, each floor would contain a common lounge. The first floor also provides an office for a nurse and an administrator. The activity building is connected to the main structure by an enclosed corridor and contains a 2,100 square foot dining room, an 800 square foot kitchen and a 2,100 square foot activity room. The apparent building height would increase from east to west due to the natural slope of the site. The east end of the building would be approximately 27 feet above grade level while the west end of the building would be approximately 36 feet above grade level. The grade along the south face of the building (the "front" of the building) would be graded to a uniform level which would result in a 25 foot building height along the south elevation. Parking for 134 vehicles has been provided, 50 stalls of which would be located in the basement of the main building and accessed from the west (Motor Place) end of the structure. The cooking facilities associated with the existing day-care center would be shifted into the kitchen in the activity room and the applicant has stated that there would be between five and 12 additional employees hired. The applicant originally stated in Exhibit 25 that three acres of the subject property would be subdivided from the total ownership and would be transferred to the retirement center as a separate parcel; the applicant now indicates that there will be no subdivision of the subject property (Exhibit 59).

5. The proposed building is located on top of the present septic tank drainfield system for the church and day-care center. The applicant proposes to extend a sanitary sewer to serve all uses on the subject property. The Alderwood Water District has indicated that both public sewer and water service is available (Exhibit 29).

6. 164th Street SW is designated as a principal arterial on the county's Interim Arterial Plan as adopted by Council motion on December 8, 1983. The standard r/w width for such arterials pursuant to SCC 26B.56.010 is 100 feet. The width of said r/w adjacent to the subject property is 60 feet (Exhibit 33). The Department of Public Works (DPW) has recommended that 20 feet of addition r/w be deeded to the county along 164th Street SW; the current site plan (Exhibit 52) portrays a 20 foot wide strip along the property's frontage on 164th Street SW which may be intended to portray land which would be deeded to the county for r/w. In addition to r/w needs on 164th SW, the DPW indicates that 10 feet of additional r/w along both Motor Place and 13th Avenue W will be necessary.

7. Chapter 49, Laws of Washington, 1982, 1st Ex. Session, was approved by the Governor on April 20, 1982, and became effective on July 1, 1982. Section 5 of said law amended RCW 82.02.020 so as to provide guidance to cities and counties regarding the imposition of what are commonly called "up-front development fees". Said Section provided, *inter alia*, that "[n]o county, city, town, or other municipal corporation shall impose any tax, fee, or charge, either direct or indirect, on the. . .subdivision, classification or reclassification of land. However, this section does not preclude dedication of land or easements pursuant to RCW 58.17.110 within the proposed development or plat which the county. . .can demonstrate are reasonably necessary as a direct result of the proposed development or plat to which the dedication of land or easement is to apply. This section does not prohibit voluntary agreements with counties. . .that allow a payment in lieu of land dedication or

to mitigate a direct impact that has been identified as a consequence of a proposed development, subdivision, or plat. . . ." Said law also provides guidance regarding voluntary agreements and deals with certain other topics. It is official county policy that Title 26B SCC, as revised and updated in April of 1982 and July of 1983, is in compliance with Chapter 49, Laws of Washington, 1982, 1st. Ex. Session.

8. Title 26B SCC (commonly known as the County Road Ordinance) requires certain actions by applicants dependent upon the computed Level of Service (LOS) of adjacent road systems. The term "road system" is defined within Title 26B SCC as "those existing or proposed county roads (if any) which are located in the development site and/or between the development site and the nearest state highway or highways, *projected to be utilized by ten percent or more of the traffic generated by the development.*" [SCC 26B.51.080, emphasis added]

9. "In order to provide sufficient information to access a development impact on the transportation system and level of traffic service, the director [of the Department of Public Works (DPW)] or following hearing, the hearing examiner, planning commission, county legislative authority, or other county hearing body, may require a traffic study. This decision will be based upon the size of the development proposal, availability of previous studies in the same area, existing roadway conditions, traffic volumes, accident history, expressed community concern and other factors relating to transportation." [26B.53.010] When a traffic analysis (also commonly known as a traffic study) is required it is to be prepared by a professional [SCC 26.B.53.020] and must contain certain items [SCC 26B.53.030]. One of the required elements is an analysis of the LOS for both the current traffic situation in the area of the proposed project and the projected situation upon completion of the project. If completion is to be more than two years away, a growth projection for other de-

velopment in the vicinity must also be included [SCC 26B.53.030(1)(f)(iii)]. Furthermore, traffic volumes must be projected for 10 years into the future unless future phases of the proposed development would extend beyond 10 years, in which case the projection must continue on to the estimated completion of the development [SCC 26B.53.030(1)(h)].

10. When the traffic study indicates that an off-site traffic impact would be created or exacerbated by a particular development, the applicant for that development "must submit a written proposal to fulfill [his] obligations under [Title 26B SCC] to the [DPW] in conjunction with [his] traffic study if required, or in any event sufficiently far enough in advance of a public hearing. . .to allow review and recommendations by the [DPW] and hearing body." [SCC 26B.55.010(3)] Title 26B SCC requires that "the cost estimate for, method of completion of, and level of improvement required for a development will be. . .established by the county authority issuing the. . .approval.. . .Facilities shall be designed so that in general no more than five hundred (500) vehicles per lane are projected for the thirtieth (30th) highest hour of the design year (twenty (20) years hence), unless for good cause the county finds that a different design volume should be employed." [SCC 26B.54.020].

11. The timing and method of obligation fulfillment differs according to the type of permit or approval being sought and is stipulated in Chapter 26B.55 SCC. Generally speaking, obligations are to be imposed as a condition of preliminary plat approval for execution and/or fulfillment prior to plat recordation, are to be executed prior to the effective date of a rezone, are to be imposed as a condition on the issuance of a conditional or special use permit to be fulfilled or executed prior to building permit issuance or are to be executed and fulfilled prior to building permit issuance, whichever comes first [SCC 26B.55.030(2), .040(5), (6) and (7) and .050].

12. Several items pertaining to the traffic impact associated with the project have been submitted during the course of the application's processing:

A. The first traffic submittal was received by the PD on June 7, 1984 in which the applicant stated that eight additional personnel would be hired, that the facility would contain between 66 and 77 living units, that the present kitchen facilities for the day-care center would be shifted into the new activity building, that two accesses onto 164th were desired, that the driveway on the south side of the church between the two accesses would be left, that presently owned school vans would be used to take residents on shopping and other trips and that only limited traffic impact would result (Exhibit 21).

B. On June 29, 1984 a series of traffic counts taken by the day-care center's bookkeeper were submitted. Said counts indicate that weekday traffic ranges from approximately 650 to slightly over 1,000 trips per day, that Saturday day-care traffic normally amounts to approximately 200-300 trips per day and that Sunday church traffic amounts to between 74 and 176 trips. Attached to the traffic counts was a copy of a traffic study done by a registered engineer for a retirement center in Renton (Exhibit 18).

C. On October 30, 1984 the applicant presented an offer to the DPW for fulfillment of its obligations under Title 26B SCC. The applicant offered to deed 10 feet of r/w along the property's frontage on both Motor Place and 13th Avenue W, 20 feet of r/w along the property's frontage on 164th Street SW, to con-

struct curb, gutter and sidewalk along the frontages on both Motor Place and 13th Avenue W and to provide a 25 foot r/w from all three road frontages to parcel which was going to be deeded over to the retirement center (Exhibit 25).

D. On November 13, 1984 the DPW stated that the applicant's offer was acceptable (Exhibit 26).

E. On December 14, 1984 the DPW submitted a memorandum noting several LOS "D" and "E" situations and concluding that in addition to the previously identified obligations, the applicant would also have to agree to fund the complete relocation of the curb, gutter and sidewalk along the property's frontage on 164th Street SW (Exhibit 33).

F. On December 14, 1984 the Washington State Department of Transportation (WSDOT) stated that the 164th Street SW/1-5 interchange presently operates at LOS "E" during the peak hour. Based upon conversations with the DPW, the WSDOT concluded that participation in interchange improvements would not be necessary (Exhibit 35).

G. On February 4, 1985 the applicant submitted a statement which indicated that only approximately two-thirds of the state licensed day-care capacity of 230 children per hour was presently in use. The applicant stated that if the 77 unit retirement home were not to be approved, it would increase its advertising for the day-care center to generate as high a volume of activity in that facility as the license would allow. The applicant argued that by constructing the retirement center it would

be decreasing the potential traffic associated with the site by approximately 550-600 vehicle trips per day (Exhibit 38).

H. On February 6, 1985 the DPW submitted a revised report and recommendation in which it indicated that the application should not be approved and that the hearing should be postponed until November, 1985 by which time the county was expected to have completed a road system study of 164th Street from I-5 to SR 527 (Exhibit 42). The PD concurred with the DPW recommendation (Exhibit 43).

I. On May 2. 1985 a traffic study prepared by Christopher Brown, P.E., was submitted to the county (Exhibit 58). Said study was based upon a 122 unit facility and presumed that 33% of site related traffic would utilize 164th Street east of 13th Avenue W and that the remaining 67% of site related traffic would utilize 164th Street west of 13th Avenue W (Exhibit 58, p. 10). The trip distribution was "based on the current church population distribution and was developed from the postal zip code addresses of 2,292 parishioners." The Brown analysis concludes that with the maintenance of the existing signal system at 13th Avenue W/164th Street SW, with the addition of a westbound right turn lane on 164th Street SW for northbound I-5 traffic and with the addition of an eastbound right turn lane on 164th Street SW for southbound I-5 traffic, the LOS at 13th Avenue W/164th Street SW and at the I-5 interchange would not be lower than LOS "C" upon project conclusion (Exhibit 58, p. 13). Brown's analysis was predicated upon a supposition "that access during the peak hour would be via a driveway or driveways to

Meadow Road [13th Avenue W]. It is important in the design of the site to ensure that access to the parking facilities serving the retirement center and it's ancillary [sic] buildings have a clear access to Meadow Road. There is not sufficient capacity on 164th Street S.W. to imply reasonable access from driveways to this major arterial. Accordingly, the key mitigating measure for this site is the providing of a safe access to Meadow Road. Internal reorganization of the day-care center's play area may need to be reviewed to ensure that this provision is made." (Exhibit 58, p. 14)

J. The applicant submitted a statement on May 14, 1985 in which it argues that not more than 2% of project traffic would utilize 164th Street east of the project site based on a statement that 2% of the present day-care staff live east of the site (Exhibit 59).

K. On June 12, 1985 the DPW published a memorandum in which it stated that Snohomish County would be widening 164th Street SW between 13th Avenue W and I-5 to five traffic lanes in 1985 and that the applicant should contribute proportionately to the cost of said project in the amount of $812.21. In addition, the DPW recommended imposition of the commitments and improvements which the applicant had offered in its October 30, 1984 submittal (See Subitem C, above). The DPW also stated that "All full time ingress and egress for the retirement and day-care facilities [must] be taken from 13th Avenue only. The church facility will continue to use 164th Street for ingress and egress." [emphasis added] Finally, the DPW stated that there had been a reduction in the volume of traffic

on the 164th Street off ramp from I-5 of approximately 40% since the opening of the new SR 525 route. "This has slightly improved the level of service but there still remains a level of service problem. Based on that problem, a major project which has applied for building permits for 303 units has agreed to fund the solution to the level of service problem at the off ramps by constructing an additional lane from which to make right turns onto 164th. The State Department of Transportation has agreed to the concept of the ramps and will be entering into an agreement with the developer once the construction drawings for the improvement are completed. We are therefore considering the level of service problem I-5 off ramp funded for improvement by a private party." (Exhibit 62)

L. The DPW presented a statement during the June 18th hearing which had been prepared on June 17th (Exhibit 64). The statement indicates that preliminary conclusions from the county study of 164th Street will indicate that a combination of five and seven lanes will be necessary in order to adequately handle traffic flow on 164th. Since installation of the left turn lanes and traffic signal at 13th Avenue W, there has been a 60% reduction in accident rate at said intersection; a "modest reduction" in the accident rate has also occurred between 13th Avenue W and 3rd Avenue E since the installation of traffic signals at 13th Avenue W, 10th Avenue W and 3rd Avenue E. The statement indicates that DPW knows "where intersections need to be revised and where signals need to be placed. We know where continuous left-turn lanes should be

converted to closed type medians for control of left-turn movements at later points in time." No specific information regarding these statements has been provided for the hearing record. The statement indicates that the DPW "has an interim improvement plan to accommodate traffic safety and land development activities." The DPW will be using "currently budgeted highway safety funds" to provide a left turn lane on 164th Street between I-5 and 13th Avenue W in 1985. The statement mentions the developer proposal to fund an additional northbound off ramp lane at the I-5 interchange. The DPW "has proposed $400,000 for interim improvements on the 164th Street corridor for 1986 in the Six-Year Transportation Improvement Plan. This plan was approved at a public hearing on June 12, 1985." The DPW has "identified nine areas along the 164th Street corridor as having cost benefit ratios for making safety improvements." No specific locations were provided for the hearing record.

13. 164th Street SW/SE between I-5 and SR 527 has been determined in at least six previous cases to be an inadequate roadway suffering from not only deficient LOSs at critical points but also from inadequate (hazardous) conditions associated with left turn movements (See Mt. Pacific Development Corporation rezone, ZA 8310252; Martha Crest preliminary plat, ZA 8401021; Balser Investments rezone and plat, ZA 8407184; Fitzgarrald rezone, ZA 8310231; and the recent (January 29, 1985) Radovich conditional use permit, ZA 8409222, and (February 4, 1985) Nancy Partnership conditional use permit, ZA 8409236). The issue of road inadequacy was challenged through an appeal to the County Council in both the Mt. Pacific Development Corporation and Martha Crest cases; the Coun-

cil sustained the conclusion regarding road inadequacy in both appeals.

14. The present LOS at key intersections on 164th Street is "D" or "E".

15. "Developers whose projects will be served by a road system which will be at a level of service of E or below following completion of the development, or which will cause or exacerbate an inadequate road condition shall incur an obligation which may be fulfilled" either by forming an RID for full improvement or by voluntarily agreeing to pay a "proportionate share of the cost of mitigation improvements in accordance with" Title 26B SCC. Development permits may not be issued until the road work is funded and under contract or construction; occupancy may not occur until the improvements have been completed. [SCC 26B.55.050 with references to SCC 26B.55.040]

16. The DPW testified during the June 18th public hearing that it could not accept Brown's traffic distribution as set forth in his traffic study (Exhibit 58). The DPW also disputes the applicant's trip distribution as set forth in Exhibit 59. The DPW has not required any replacement analysis to be performed but is of the personal opinion that between 10% and 15% of project related traffic would utilize 164th Street east of 13th Avenue W. The DPW representative testified that the inadequate road situation east of 13th Avenue W on 164th Street would not need to be evaluated within the context of the instant application but that it might be evaluated in the context of other applications yet to be heard.

17. The most recent DPW memorandum (Exhibit 42) includes as an attachment a statement presented by the DPW to the County Council on or around January 30, 1985. In said statement, the DPW made note of the fact that the present volumes on 164th Street SW/SE exceed the highway's capacity and that the "lack of an adequate combination of separate left-turn lanes, traffic signal con-

trol systems, controlled left-turn movements and controlled property access traffic has created an unsatisfactory level of service and unsafe traffic conditions throughout the corridor." Said statement indicated that the previously identified road inadequacies still continue to exist. The county has funded a full corridor study, mentioned above, which is now well underway. The DPW anticipates that said study will be completed in the near future and that the DPW will be prepared to present a recommendation to the County Council regarding corridor improvements during the second half of 1985.

18. The PUD has indicated that adequate electrical service can be provided to the instant development with distribution facilities as they presently exist (Exhibit 17).

19. The City of Lynnwood has submitted two comments during the review process which indicate that the City has no objection (Exhibit 28) and recommends approval (Exhibit 12).

20. Letters and a petition of support were submitted (Exhibits 41, 63, 65 and 66). Letters, statements and petitions in opposition to any new development on 164th Street SW/SE without concurrent road improvements were submitted by the Martha Lake Homeowners' Association, the Martha Lake Community Club and many area residents (Exhibits 30, 44-50 and 67-70). Several of said exhibits challenge the appropriateness of the PD's Determination of Nonsignificance and also challenge the legality of the proposed use in the RR 9600 zone.

PART III. CONCLUSIONS

Traffic

1. There seems to be a substantial degree of general interest in the outcome of the instant decision, especially with respect to the off-site road situation. Therefore, the Examiner will present a lengthier discussion of the mean-

ing and implication of Title 26B SCC than would otherwise be the case. There seems to be some concern within the development community that Title 26B SCC is unnecessarily delaying land development projects in unincorporated Snohomish County. It must first be recognized by all parties with an interest in development in the county that Title 26B SCC is not a county law which is intended to expedite land development projects. The purpose of Title 26B SCC is "to ensure that public health, safety and welfare will be preserved by having adequate roads to new and existing developments by requiring all land development projects in unincorporated Snohomish County. . .to pay for a proportionate share of the cost of road improvements due to such land developments." [SCC 26B.50.020] The policy statements within Title 26B SCC further indicate that if a development is to be served by a road having an inadequate LOS it "will not be approved unless provisions are made. . .for the facilitation of future improvements" or "for correcting the hazard" [SCC 26B.52.010(3) and (4)]. In other words, the stated purpose of Title 26B SCC is to restrict development on roads within unincorporated Snohomish County that are not up to a stated level of acceptability until arrangements for correction or actual corrections can be made. If a road does not meet the standards set up in Title 26B SCC, then development along that road will be delayed by the requirements of Title 26B SCC.

2. Most ordinances of a governmental agency embody concepts, policies or philosophies which are set forth in a mandatory, regulatory fashion. Title 26B SCC is no different. There are at least eight basic philosophical concepts which the Board of County Commissioners and County Council have incorporated into the regulatory scheme of Title 26B SCC:

A. First, a developer should be obligated to pay only for impact directly attributable to his project and to pay on a proportionate basis

for impacts which are caused both by his project and by other traffic [SCC 26B.55.030 and .040].

B. Second, the county is not going to encourage or allow a situation in which we improve a road for the traffic expected two years hence, only to tear it up again and rebuild it for another two year period only to tear it up and rebuild it again and so on and so on. Rather, when a road is found to be deficient, the required improvement will be based upon the traffic needs 20 years hence [SCC 26B.54.020]. (There is a special exception for "inadequate" roads; see subitem II, below.)

C. Third, not all new construction activity should be subject to the restrictions and obligations associated with road improvements. Small projects such as two lot short subdivisions and single family residences should be exempt [SCC 26B.51.020].

D. Fourth, it is each developer's responsibility to provide factual studies and information to the county in order to allow a reasoned determination of road conditions [SCC 26B.53.010].

E. Fifth, a developer should analyze and be responsible for helping to solve problems on any county road leading to a state highway which handles *10% or more* of the traffic associated with that developer's project [SCC 26B.51.080]. Those readers who are historically inclined will recall that when Title 26B SCC was originally adopted by the Board of County Commissioners in 1979, only those roads handling a *majority* of project related traffic were deemed to be subject to the provisions of Title 26B SCC. The County Council

in a major amendment to Title 26B SCC in 1982 reduced the figure from a majority to the present 10%.

F. Sixth, the primary means to determine the acceptability of the road system serving the project is the LOS measure. LOS is a measure of the ratio of the present and/or projected volume on a road to its theoretical capacity [SCC 26B.52.010, SCC 26B.53.030 and Chapter 26B.55 SCC].

G. Seventh, there is to be no development (as defined in Title 26B SCC) whatsoever whenever the LOS on the road system (as defined) is "E" until there is an iron clad certainty that improvements will physically occur before the proposed project is occupied [SCC 26B.55.050]. The requirement for an "iron clad certainty" is clear in the language of the ordinance: no building permit can be issued "unless *all* funding necessary for the work *is committed* to the road project *and* the work is either *under contract or being performed.* No use or occupancy of such developments may occur until the *required road improvements are completed.*" [SCC 26B.55.040(2) referenced by SCC 26B.55.050].

H. Eighth, if a road is found to be "inadequate" there will be absolutely no development (as defined) until the "inadequacy" has been completely removed. The same restrictions that apply to the LOS "E" situation apply to "inadequate" roads: the "iron clad certainty" is still required before building permit issuance and the project has to be completed before occupancy. Removal of an inadequacy does not require that the road must be improved to its

ultimate 20 year-hence configuration. It does require, however, that the "inadequacy" be *fully* alleviated. The DPW and this Examiner have been in full agreement on this point in all prior cases. The prohibition against development in LOS "E" and "inadequate" situations does not mean that Title 26B SCC requires any given developer to fully fund the required remedial measures. Title 26B SCC is quite clear that a developer can only be obligated to pay for his or its proportionate share of the cost of removing the problem. However, Title 26B SCC is equally clear and equally demanding that physical development not occur until a package has been put together and funded by which the actual, needed improvements will be done before project occupancy.

3. The traffic aspect of the instant case must be evaluated in light of the basic philosophical precepts of Title 26B as described above.

4. Title 26B SCC is an ordinance of the county which, like all other ordinances, requires that its standards be followed. Title 26B SCC establishes a hierarchical system of determining road improvement obligations: if the road system that would serve a project is adequate, then no developer-funded off-site road improvements are necessary; if the road system is inadequate, either because of some hazardous condition or because of excessive traffic volumes, then no development is to go forward until improvements have been financially guaranteed. Every project which this Examiner reviews must stand scrutiny under Title 26B SCC as well as under any other applicable county ordinance. In the instant case, the off-site road conditions are such that compliance with Title 26B SCC becomes one of the most critical matters in the application.

5. 164th Street SW/SE has been declared to be an inadequate roadway because of the hazard associated with unprotected left turn movements and the high volume of traffic. Evidence entered into those cases cited in Finding 13, above, has proven to the satisfaction of this Examiner and to the satisfaction of the Council that the present inadequate situation will not be alleviated simply by the installation of traffic signals. Both the Examiner and the Council have been convinced that left turn lanes/pockets would also be necessary in order to provide a safe haven for those many motorists who have to make left turns across two lanes of oncoming traffic. It is worth note that the DPW, which prior to the Radovich case held the position that the installation of turn signals at three intersections on 164th Street SW by themselves would remove the inadequacy, substantially changed its position prior to the February, 1985 hearing in the instant case because of actual experience with the turn signal situation at 13th Avenue W. The DPW has once again changed its position. We now have a situation in which the Examiner and the Council are in agreement that mere installation of traffic signals will not alleviate the present inadequate conditions on 164th Street and in which the DPW agrees with that statement but then goes on to argue that the inadequate conditions east of 13th Avenue W on 164th Street should be ignored in the context of the instant case. Under Title 26B, any development which would exacerbate the present situation cannot be approved unless specific provisions are made to alleviate the hazard.

6. The Hearing Examiner is required to follow the law of Snohomish County regardless of any recommendations or requests to the contrary presented by the DPW, the PD or anybody else for that matter. Title 26B SCC says that "[t]he county, in approving or permitting a development, shall *consider* the [DPW's] recommendation and *act in conformance* with Chapters 26B.50 through 26B.58." [SCC 26B.54.010, emphasis added] This Examiner has

never sought to rewrite or reshape Title 26B SCC to his own personal philosophical satisfaction; this Examiner has likewise rejected attempts by others to reshape Title 26B SCC to their personal philosophical preferences. If the philosophical basis of Title 26B SCC is to be changed, then that change must be done by the County Council and must be done by revising the regulatory prescriptions contained within Title 26B SCC. Until it is changed, if ever, it is the law of the county.

7. The DPW has failed to provide any factual evidence which would support its current position. The latest DPW statement contains promises and conclusory statements without any specificity or substantiating evidence. (The Examiner's decision in this case just as in any other case involving Title 26B SCC must be based upon factual evidence present in the record. The Examiner feels obligated to indicate that he is frankly surprised and more than a little disappointed that the recent DPW statements and presentations have not contained any hard, factual evidence. The DPW is well aware of the need for such information and one would have expected the DPW to present such information if it existed.) Further, the Examiner must regretably conclude that the DPW testimony during the June 18, 1985 hearing actually contradicted itself. The DPW argued that the inadequate road conditions on 164th Street east of 13th Avenue W did not need to be evaluated in the context of the instant application since 164th Street enters the city limits of Mill Creek before reaching state highway SR 527. However, later on in the hearing, the DPW stated that other, unspecified types of applications would be evaluated for their impacts on 164th Street east of 13th Avenue W. The Examiner frankly cannot understand why one application should be treated differently from another: traffic is traffic, impact is impact. The DPW argument amounts to selective enforcement of the law of Snohomish County which is morally unsupportable and patently inequitable. Furthermore,

the very notion of ignoring a county road simply because it enters a corporate boundary prior to reaching a state highway is one which the DPW has never before espoused in the entire six year history of Title 26B SCC.

8. The DPW has handled the instant application differently from the way it handles most (if not all) other cases with which the Examiner is familiar. The DPW stated on the record that it disagreed with Brown's trip distribution as set forth in Exhibit 58 and also with his LOS calculation methodology. Specifically, the DPW felt that using the church mailing list to determine trip distribution was completely unacceptable and agreed with the Examiner that putting nonexistent road improvements into the calculation of existing LOS was completely contrary to Title 26B SCC. However, the DPW never required Brown to revise the traffic study nor has it officially rejected said study. There was a 12 lot, single family subdivision known as Cedar Ridge which was considered by Snohomish County in the spring and early summer of this year in which Brown provided the original traffic study. The DPW found Brown's analysis in the Cedar Ridge traffic study to be inadequate and wrote a memorandum rejecting that study. The applicant then retained a second consultant (KJS Associates) which performed an entirely new traffic study which was also rejected by the DPW because of disagreement over LOS calculation methodology. The DPW has offered no explanation as to why the instant project is being allowed to get by with something that plats like Cedar Ridge have not been allowed in the past.

9. The Examiner agrees with the DPW that Brown's two-third/one-third trip distribution is not at all supportable. It would appear that Brown, in fact, did not use church membership to derive his distribution as he thought he did but more likely used a mailing list of those families who use the day-care facility on the subject property. (The Examiner reaches this conclusion on the factual basis that the church has only 120 families in its membership whereas

Brown used a 2,000+ person mailing list for his work.) The places of residence of either of said groups is a very poor estimator of trip distribution of permanent residents on the subject property. The Examiner also agrees with the DPW that the applicant's 98%-2% distribution is even less supportable than is Brown's. It seems to the Examiner that the DPW conclusion that more than 10% of project traffic will be using 164th Street east of 13th Avenue W is entirely probable. The Examiner cannot guess the percentage any better than anybody else seems to be able to. However, the fact that there are many medical, shopping, recreational and other types of destinations along 164th Street to the east of 13th Avenue W is supportive of the proposition. Absent very compelling evidence (which certainly has not been provided in the record of the instant proceeding), common sense says that greater than 10% of the traffic will travel on 164th Street east of 13th Avenue W.

10. Approval of a development which would create the need for left turn movements along 164th Street SW would clearly exacerbate the present inadequate conditions. In fact, it is the existence of left turning movements themselves which have led to the declaration of a road inadequacy.

11. Like the other projects before it, operation of this project will in fact create additional left turning movements. It is fair to say that a substantial number of those trips will either originate from the west or will have destinations to the east. In either event, left turn and lane crossing movements will be a necessary part of the vehicle trip. The proposed development will exacerbate the present inadequate condition by increasing the number of left turn movements.

12. There has been absolutely no evidence provided by any of the parties to support the claims that traffic improvements are guaranteed and that dollar commitments

have been made for those improvements. The closest thing to an exception to the above statement would be the apparent intent of the DPW to widen 164th Street SW to five lanes between I-5 and 13th Avenue W in 1985. The preliminary negotiations which the DPW is having with the proposed 303 unit apartment developer regarding the northbound I-5 off ramp project cannot be considered as any type of a commitment. Testimony during the hearing indicated that that apartment project is in the midst of an environmental impact statement (EIS) process and that the final EIS has not as yet been issued. A committment to fund a road improvement does not, therefore, exist. Finally, the westbound 164th to northbound I-5 drop lane relied upon by Brown to reach an adequate LOS apparently isn't included in anybody's program. (According to DPW testimony there are "structural problems" relating to the existing bridge abutment that have not been resolved.)

13. Even if the Examiner gave the applicant and the DPW the benefit of the doubt, it would not be possible to conclude that the requirements of Title 26B SCC had been properly met. With the benefit of the doubt, one could say that the segment of 164th Street SW from I-5 to 13th Avenue W is funded for improvements which would alleviate the hazardous conditions associated with turning movements in that segment only. Therefore, a building permit could be issued with occupancy restricted until construction of the fifth lane *if* that were the only area of concern. Unfortunately, project traffic will use 164th Street SW east of 13th Avenue W to an extent which also brings that portion of 164th Street SW under the scrutiny of Title 26B SCC. There are no funds committed (at least as far as the evidence in the record reveals) for any road improvements on 164th Street east of 13th Avenue W. The Six-Year Transportation Improvement Plan is a priority listing of projects which the county wishes to pursue. To the best of the Examiner's knowledge it does not con-

stitute a budgetary commitment by the County Council for the expenditure of those funds in any other than the present year. The code requirement for the existence of committed funding does not, therefore, exist based upon the DPW testimony and evidence entered into the record. Furthermore, the I-5/164th Street interchange is a part of the road system serving the subject property. There is inadequate evidence of both the actual and future LOS at that location because of the erroneous LOS calculation procedures utilized by Brown. If the present and/or future LOS is "D", the applicant must be assessed a percentage of the cost of necessary improvements or the applicant must agree to make certain interim improvements which would make a reasonable change in the deficiency. If the present or future LOS is lower than "D", even more stringent restrictions would apply.

14. The whole situation in the instant case is compounded by the lack of factual evidence and creditable analysis. These shortcomings are not the Examiner's fault. The Examiner's prior decision (Exhibit 56) made it abundantly clear that factual evidence would be needed. That the applicant has chosen to pursue its project at this time without proper evidence is apparently its own decision. That the DPW has not made this applicant meet the same evidentiary requirements that it has set out for others or has not made up the evidentiary shortcomings itself is apparently solely the DPW's decision. If the Examiner can be faulted for anything in this process, it is for requiring full compliance with Title 26B by this applicant just as this Examiner has required of every other applicant for the last six years: nothing more, nothing less. The Examiner will gladly take the blame for treating everyone equally.

15. The applicant has implied that approval of the instant proposal would be the lesser of several alternatives, which could include commercial development of the site or further expansion of the day-care facility. The Examiner

does not base decisions regarding cases upon a theory of the lesser of two bad situations. In the first place, if any other type of land use were to be proposed for the subject property, it too would have to stand scrutiny under Title 26B SCC. Thus, whether the property is zoned residential, multiple family or commercial is completely immaterial insofar as justifying approval of the instant proposal is concerned. The applicant's proposal must stand on its own two feet. If that proposal does not meet its obligations and requirements under Title 26B SCC, then it cannot be approved. The applicant's statement regarding a tradeoff of traffic from the retirement center for potential traffic from an expanded day-care center is in essence a veiled threat which does not create a legal justification for ignoring the provisions of Title 26B SCC. There is no adequate evidence in the record to determine the degree to which the day-care center is a nonconforming use. However, the applicant should be aware that the evidence does indicate that there may be a nonconforming element to the day-care center and that if the center is in part nonconforming, it is subject to the expansion limitations of Chapter 18.84 SCC.

SEPA

16. The PD continues at least in part to base its Determination of Nonsignificance (DNS) upon compliance with Title 26B SCC. The DNS states that mitigation of traffic impact will be accomplished in accordance with said Title "which may include the necessity for immediate or future road improvements as determined by the Department of Public Works prior to final project approval." (Exhibit 8) In the decision of February 22, 1985, the Examiner partly excused the PD's position by noting that the DNS was issued on May 7, 1984 prior to the receipt of the then most recent DPW position paper (February 6, 1985). The Examiner did note, however, that the DNS was issued well after several of the decisions issued by the Examiner and/or Council referenced in Finding 13, above. The Ex-

aminer then concluded that the PD should reevaluate SEPA compliance once full and proper disclosure of the Title 26B SCC situation had occurred. Unfortunately, there is no more showing now than there was in February that Title 26B SCC requirements have been met and the Examiner must conclude now as he did then: based upon the evidence and testimony which is in the record of the instant proceeding, it can no longer be concluded, if in fact it ever could have been, that the proposed development would have but an insignificant impact upon the conditions on 164th Street. State and county SEPA regulations authorize the issuance of mitigated DNSs in which specific conditions are imposed to mitigate potentially significant impacts. Unfortunately, a statement that impacts will be mitigated by some unknown improvements carried out under Title 26B SCC cannot begin to pass muster as a mitigation measure on a mitigated DNS. The present DNS must therefore again be rejected based upon the present knowledge regarding traffic impacts on 164th Street. Until a revised DNS or a Determination of Significance with its attendant EIS has been prepared, the county can take no action to approve the instant proposal.

17. The county has authority to deny a project without compliance with SEPA if "irreconcilable conflict with adopted plans, ordinances, regulations or laws" exists [SCC 23.16.280(1)].

Site Plan

18. The Examiner wishes to offer one comment regarding the relationship between the site plan and issues surrounding Title 26B SCC. The traffic analysis prepared by Brown (Exhibit 58) was predicated upon all project traffic entering the site from 13th Avenue W. The DPW recommendation to support the project also hinges upon all retirement home *and* day-care entry from 13th Avenue W. Yet, the site plan (Exhibit 52) which the Examiner has been asked to approve turns its back on 13th Avenue W.

The obvious entrance to the site is from 164th Street SW. Entrance to the underground garage is only available at the west end of the building which could be reached from the 13th Avenue W entry only by driving completely around the south end of the church. A major redesign and alteration of the entire site plan and circulation would be necessary in order to make a 13th Avenue W entry feasible. Furthermore, an entry off 13th Avenue W must be more than feasible, it must be desirable if there is to be any hope of inducing traffic to use that access point. Brown even goes so far as to suggest that some alterations to the day-care facility would be necessary if 13th Avenue W were to be used as primary ingress/egress. The site plan has never been changed since Brown and the DPW made their statements.

19. The Examiner cannot be expected to approve a site plan which obviously won't work under the conditions that would have to be imposed on the permit which would be approving it. When the applicant realized the need for orienting the project to 13th Avenue W, the applicant should have revised its site plan in order to present a workable solution to the Examiner for consideration.

Zoning Conformance

20. When the Examiner wrote his first decision on this case (Exhibit 56) he had a nagging doubt that the proposed facility was even allowed in the RR 9600 zone (See Exhibit 56, Conclusion 11). The Examiner specifically asked the PD to provide further analysis prior to any additional hearings. The PD has concluded that the proposal would "qualify as a rest (retirement) home" based primarily upon the common food preparation area, the lack of a kitchen or dining room in the individual units and the applicant's verbal indication that the building would be owned by the non-profit corporation without any sale of individual units (Exhibit 61, p. 2). It is worth noting, however, that the PD has calculated the applicant's parking requirement

based upon the zoning code standard for "retirement housing" and not upon the zoning code standard for "hospitals, convalescent homes, sanitariums, institutions for the aged and children, welfare or correctional institutions" [See SCC 18.72.040(3) and (6)]. The PD is calling the project a rest home for use considerations, but retirement housing for parking considerations. No conditional use permit for this type of project has ever been issued on RR 9600 zoned land in unincorporated Snohomish County.

21. The applicant has published a one page brochure describing its proposed "retirement center" which indicates that the monthly fee would "cover one major meal per day (breakfast & lunch will be available at a very reduced rate". The brochure indicates that entry age will be 60-62 and that applicants "must be mobile and able to care for him/herself". "If, and when they require nursing care, three (3) months of care will be provided as part of the entry fee. Then, if they still need nursing care, they will have to move out of the facility and seek care elsewhere." (Exhibit 67).

22. The provision which has been relied upon by the applicant and the PD to justify the instant proposal is SCC 18.18.030 which states that "hospitals, sanitariums and rest homes" may be permitted in the RR 9600 zone as a conditional use. "'Sanitarium and/or rest home' means a structure and/or premises for nursing, dietary care and other personal services rendered to convalescents, invalids and aged persons, but excluding contagious, communicable, or mental disease cases and surgery or primary treatments such as are customarily provided for in hospitals." [SCC 18.08.540] The "rest home" of SCC 18.08.540 is what is now commonly called a "nursing home". It is obvious from both the layout of the floor plan and the testimony and evidence presented by the applicant that those persons residing in the proposed retirement home will be fully capable of taking care of themselves. The very fact that there will only be five to 12 employees directly associated

with the proposed facility makes it clear that intensive nursing or theraputic care is not going to be provided. (A recent nursing home application indicated that there would be some 70 employees involved in providing 24 hour-a-day care to approximately 124 residents.) The question arises as to whether or not the proposed facility is in fact a multiple family dwelling of some type. For example, a boarding house is "a building, other than a hotel, where meals, and lodging are provided for compensation to non-transient persons." [SCC 18.08.105] A multiple family dwelling is "a dwelling containing two or more dwelling units" [SCC 18.08.220] and, when the definitions for dwelling, dwelling unit, family and kitchen are combined, one finds that a dwelling unit is "one or more rooms in a. . .structure designed or used for residential purposes. . .designed for occupancy by. . .one or more persons related by blood, marriage, adoption,. . .for living or sleeping purposes and having not more than one. . .room used or intended or designed to be used for cooking or preparation of food." [SCC 18.08.210, .230, .245 and .380] The proposed facility would seem to have more of the characteristics of a boarding house or multiple family dwelling than it would of a rest home. In fact, the association of the phrase "rest home" with hospitals and sanitariums in the conditional use clause would seem to suggest that rest homes as contemplated within the Snohomish County zoning code do not include retirement homes or centers. The Examiner is compelled to conclude that the proposed facility is not a rest home as that term is intended to be used in the county zoning code.

23. The Examiner wishes to hasten to point out that he has absolutley no objection to the provision of this type of facility within properly zoned areas of Snohomish County. The retirement center concept sounds like an excellent addition to the housing opportunities for senior citizens. A Christian based retirement housing facility, as proposed herein, would be an excellent opportunity for

elderly persons of the Christian faith. So it is clearly not the concept which is the problem, it is simply the zoning classification within which the concept is being developed. If the applicant were proposing this retirement housing project on multiple family or appropriately zoned commercial property, (and if there were no Title 26B SCC problems) the Examiner would have no problem at all in approving the project.

Summary

24. The instant request must be denied since it is seeking approval of a use which is not allowed within the RR 9600 zone. Even if the Examiner had been able to conclude or if, on appeal, the County Council can somehow conclude that the proposed facility can pass muster as a rest home, the permit still cannot be issued because the obligations required by Title 26B SCC have not been met.

25. The Examiner intends, and has no knowledge or belief to the contrary, that the requirements, limitations and conditions imposed by the instant decision are only such as are lawful and within the authority of the Examiner to impose pursuant to Chapter 2.02 and Titles 18 and 26B SCC.

PART IV: DISPOSITION

The Examiner hereby DENIES the requested CONDITIONAL USE PERMIT.

Decision issued this 3rd day of July, 1985.

/s/ John E. Galt
John E. Galt, Hearing Examiner

* * * * *

***** NOTICE to PARTIES of RECORD *****

The above decision of the Hearing Examiner is final unless appealed to the County Council. Any appeal must be filed

in writing with the Department of Planning and Community Development, 4th floor, County Administration Building, Everett, Washington 98201, no later than 5:00 p.m. on July 15, 1985, must contain a brief statement of the reason why error is assigned to the Examiner's decision and must be accompanied by a fee of $50.00: Provided, that the fee will not be charged to a department of the county or to other than the first appellant. Please use the county file number on all future correspondence with the county regarding this case.

Mailed on July 3, 1985 to:

APPLICANT:

Lutheran Day Care

OTHER PARTIES OF RECORD:

Wayne A. Hoskin	Donald E. Counsell
Richard H. Mullen	Louis E. Bratz, Jr.
Frances Mann	Loretta Bennett
Mrs. George A. Patterson	Helen Trotmark
Diane McClary	Louise Portch
Jerry Bergsman	Wm. J. Kemper
R.A. Balser	Ray Glover
William Krause	Frank Dalton
Janice Belden	John C. Bangerter
Alice Dawson	Katie Greif

OTHER PARTIES:

Planning Division	Community Development Division
Department of Public Works	City of Lynnwood

APPENDIX T

[seal]
Snohomish County
Hearing Examiner's Office
John E. Galt
Hearing Examiner
Peter T. Donahue
Deputy
M/S #405
3000 Rockefeller Ave.
Everett, WA 98201
(206) 388-3538

CERTIFICATION OF THE:

DECISION OF THE HEARING EXAMINER ENTERED FEBRUARY 22, 1985

APPLICANT NAME:
LUTHERAN DAY CARE

CASE NO.: ZA 8402028

STATE OF WASHINGTON
COUNTY OF SNOHOMISH ss

I, Mary Kurke, Clerk of the Hearing Examiner for the Snohomish County Hearing Examiner, certify under penalty of perjury under the laws of the State of Washington that the attached document is a true and correct copy of the original Decision of the Hearing Examiner dated February 22, 1985 under county file number ZA 8402028 and now on file in the Hearing Examiner's Office.

/s/ Mary Kurke
Signed at Everett, Washington on
October 15, 1992

Office of the
HEARING EXAMINER
Snohomish County, Washington

DECISION of the HEARING EXAMINER

PART I: SUMMARY INFORMATION

APPLICANT: LUTHERAN DAY-CARE (A NON-PROFIT CORPORATION)

FILE NO.: ZA 8402028

REFERENCE TAX ACCOUNT NUMBER: 3737-008-007-0513

TYPE OF REQUEST: Conditional use permit to establish a rest (retirement) home [SCC 18.18.030(7)].

SUMMARY OF REQUEST:

Location: The subject property is located on the north side of 164th Street SW, extending from Motor Place on the west to 13th Avenue W (Meadow Road) on the east, west of Martha Lake.

Section 2, Township 27N, Range 4E, W.M.

Comprehensive Plan - Area: North Creek
Designation: Freeway Service

Acreage: 4.89 acres

Zoning: RR 9600

Utilities - Water: Alderwood Water District
Sewage: Alderwood Water District

School District: Edmonds

Fire District: No. 1

SEPA COMPLIANCE: Determination of Nonsignificance issued by the lead department.

PROCEDURAL BACKGROUND:

1. The Examiner viewed the subject property and its surroundings on May 14, 1984.

2. The Examiner held a public hearings on the subject application on May 15 and December 20, 1984 and February 7, 1985.

SELECTED AGENCY RECOMMENDATIONS (ABBREVIATED):

Department of:
Community and Educational Services: No comment received
Planning and Community Development:
Development Division: No objection
Planning Division: Continue the hearing until November, 1985
Public Works: Continue the hearing until November, 1985
Snohomish Health District: No comment received

HEARING EXAMINER DECISION (SUMMARY):

Return to the applicant for compliance with Title 26B and reevaluation of SEPA threshold determination

PART II: FINDINGS OF FACT

The Examiner, having viewed the property, weighed the evidence presented and heard the testimony of the parties, makes the following Findings of Fact:

1. The subject property lies within the North Creek Planning Area in which the currently valid comprehensive land use plan became effective on May 25, 1977. The subject property is designated Freeway Service on said Plan. Freeway Service zoning exists to the west and Neighborhood Business zoning exists to the east of the subject property along 164th Street SW to a depth of

approximately 150 feet from the edge of the public street r/w. The remainder of the property to the west, north and east of the subject property is zoned RR 9600 as is the entirety of the subject property.

2. The subject property presently contains two separate uses and the instant application proposes a third:

   A. In or around 1966 the Shepherd of the Lake Lutheran Church was established on the subject property. In 1979 a conditional use permit was issued by the then Zoning Adjustor to allow expansion of the church. The expansion as approved contemplated three phases: a northward expansion of approximately 1,700 square feet on the existing building, a new 5,000 square foot multi-purpose room to the west of the existing building and a new sanctuary facility at the north end of the site. Only the first phase has ever been constructed (Exhibit 39).

   B. A day-care facility was established at some unknown time after the church was established. The day-care facility is owned and operated by Lutheran Day Care which is a non profit corporation. (Lutheran Day Care also has title to the entire property, including the portion under the church (Exhibit 51).) In 1978 the then Zoning Adjustor granted a conditional use permit to expand the day-care facility by the addition of two wings onto a building which has frontage on Meadow Road (Exhibit 40). The expansion which was thus authorized has occurred. In addition, two commercial coaches have been placed just to the north of the church building apparently for classroom and/or other uses. There is also a classroom/play structure located just east of

the church building. Exhibit 14 fairly accurately portrays the subject property as it now exists with the sole exception that the "meeting room" shown located just east of the south end of the church no longer exists. A custodian's house is located as shown on Exhibit 14.

C. The applicant proposes to construct a three story, 77 unit retirement home on the north portion of the property.

3. The retirement home proposal has undergone a series of significant changes since its initial submittal:

A. As originally submitted on February 8, 1984 the application sought approval for an 80 unit retirement facility to be constructed in a three story building along the north edge of the subject property (Exhibits 1 and 3). The basic dimensions of the structure were 336' x 68'. A double laned carport structure was to be provided immediately south of the main building and a "future multi-purpose education" building containing 6,400 square feet per floor was indicated between the retirement building and the existing church. Three of the buildings involved in the day-care operation (the two commercial coaches and the building just east of the church) would have been eliminated. A proposed restaurant site was reserved just west of the existing church (where the approved 5,000 square foot church building would go). Access to 164th Street SW, Motor Place and 13th Avenue W was contemplated.

B. The Planning Division (PD) of the Department of Planning and Community Development informed the applicant by letter dated February

22, 1984 that the level of detail in the application was inadequate to allow proper processing. The applicant was requested to provide additional information (Exhibit 4).

C. At some time after March 15, 1984 the applicant submitted a revised site and building plan (Exhibit 5) which contemplated a total of 77 "living units", 36 of which would be one bedroom, 41 of which would be studio or bachelor units. The main building had been reduced in size to 272'x68', the carport structure had been eliminated and the "future" building was then shown as an integral part of the facility providing the kitchen and dining space for the development. The site for the proposed future restaurant remained.

D. On May 7, 1984 the PD issued its Declaration of Nonsignificance (Exhibit 7) based upon the environmental checklist submitted with the original application and the then current site plan.

E. Both the PD (Exhibit 9) and the applicant (Exhibit 10) requested a continuation of the hearing which was originally scheduled for May 14, 1984. The reason for the continuance was "to allow for more coordination with Public Works on traffic, circulation and access issues." (Exhibit 10)

F. The hearing on May 15th was convened and the application was continued indefinitely, to be heard not later than May 14, 1985.

G. On May 14, 1984 the applicant submitted a detailed textual statement regarding the nature of the proposed facility (Exhibit 11). Said statement describes the kitchen and dining fa-

cilities (which would be shared with the day-care center), indicates that cooking facilities would not be provided in individual units but that two kitchenettes would be provided on each residential floor and that each floor would also contain a lounge and non-commercial laundry. An administration office and nurse's office would be located on the first floor. Parking was provided at the ratio of 1.25 stalls per living unit.

H. On June 7, 1984 the PD received a copy of a letter which provided information regarding the ownership of automobiles by residents of three retirement centers in the state of Washington. The letter indicates that the auto ownership ratio in those centers is substantially less than one car per resident (Exhibit 20).

I. On June 12, 1984 the applicant's architect provided information regarding parking requirements of various municipalities for retirement housing projects. The ratios ranged from 0.5-0.75 stalls per living unit (Exhibit 22).

J. The application was revised from a 77 unit facility to a 122 unit facility by a letter and revised site plan received by the PD on August 27, 1984 (Exhibits 24 and 23). Inherent in the revision was a reduction in the parking stall ratio: the revised site plan contemplated 106 parking stalls for the 122 living units. The letter estimated that vehicle trip generation would be three trips per unit per day. The additional units were incorporated into the site plan by adding an L-shaped wing to the west end of the prior building.

K. On November 20, 1984 a further set of building plans was submitted (Exhibit 27).

L. On December 13, 1984 the PD issued a memorandum which was submitted to the Examiner's office on the following date which stated that the applicant had "requested a continuance of this item to amend the Conditional Use Permit application, file a Variance for parking and further resolve Title 26B issues related to this application." (Exhibit 31) (It should be noted that a hearing had been set by the staff and the applicant for December 20th.)

M. At some time between the 13th and the 18th of December, the PD found out that the applicant did not want a continuance of the hearing. The PD thus issued a recommendation for approval on the 18th of December predicated upon the second site plan version: the one with 77 living units (Exhibit 32).

N. On December 20, 1984, the Examiner convened the scheduled hearing and took testimony from several parties solely regarding the issue of whether or not the hearing should be continued. The testimony indicated that the PD staff had called key neighborhood leaders on or shortly after December 13th informing them that the hearing was not going to be held and that the neighborhood leaders had then called citizens in the area to inform them that they need not attend the hearing on the 20th. Testimony also indicated that the neighborhood learned that the hearing was not going to be cancelled only a day or two before the 20th. A memorandum was also submitted into the record indicating that the PD staff person who had been handling the application for the staff had been subpeoned to appear in King County Superior Court at the same

time that the hearing was scheduled (Exhibit 36). The Examiner postponed any further consideration of the application until February 7, 1985 due to the confusion on the public notice, the confusion in the Examiner's mind at that time regarding the precise size and nature of the application and the inability of a key staff person to be present.

O. The public hearing was held on February 7, 1985. A slightly revised set of plans were submitted (Exhibit 52). The major change from Exhibits 23 and 27 was the elimination of the notation regarding the future restaurant. The area previouisly identified for a future restaurant is now labelled "existing interim church & employee parking".

4. The current proposal (Exhibit 52) contains 77 living units on three floors. There are 36, one bedroom, 650 square foot living units and 41, bachelor/studio, 490 square foot units. Both of the unit types contain full baths, individual hot water heaters, closet space, a wet bar with undercounter refrigerator and a deck/lanai. A kitchenette is located near the end of each floor with a communal laundry facility near the center of each floor. In addition, each floor would contain a common lounge. The first floor also provides an office for a nurse and an administrator. The activity building is connected to the main structure by an enclosed corridor and contains a 2,100 square foot dining room, an 800 square foot kitchen and a 2,100 square foot activity room. The apparent building height would increase from east to west due to the natural slope of the site. The east end of the building would be approximately 27 feet above grade level while the west end of the building would be approximatley 36 feet above grade level. The grade along the south face of the building (the "front" of the building) would be

graded to a uniform level which would result in a 25 foot building height along the south elevation. There are presently between 45 and 50 employees associated with the day-care center (which operates from approximately 5:30 a.m. to 1:00 a.m.). The cooking facilities associated with the day-care center would be shifted into the kitchen in the activity room and the applicant has stated that there would be only five additional employees hired. According to a statement made by the applicant in Exhibit 25, three acres of the subject property would be subdivided from the total ownership and would be transferred to the retirement center as a separate parcel.

5. The proposed building is located on top of the present septic tank drainfield system for the church and day-care center. The applicant proposes to extend a sanitary sewer to serve all uses on the subject property. The Alderwood Water District has indicated that both public sewer and water service is available (Exhibit 29).

6. 164th Street SW is designated as a principal arterial on the county's Interim Arterial Plan as adopted by Council motion on December 8, 1983. The standard r/w width for such arterials pursuant to SCC 26B.56.010 is 100 feet. The width of said r/w adjacent to the subject property is 60 feet (Exhibit 33). The Department of Public Works (DPW) has recommended that 20 feet of addition r/w be deeded to the county along 164th Street SW; the current site plan (Exhibit 52) portrays a 20 foot wide strip along the property's frontage on 164th Street SW which may be intended to portray land which would be deeded to the county for r/w. In addition to r/w needs on 164th SW, the DPW indicates that 10 feet of additional r/w along both Motor Place and 13th Avenue will be necessary.

7. Chapter 49, Laws of Washington, 1982, 1st Ex. Session, was approved by the Governor on April 20, 1982, and became effective on July 1, 1982. Section 5 of said law amended RCW 82.02.020 so as to provide guidance to cities and counties regarding the imposition of what are commonly called "up-front development fees". Said Section provided, *inter alia*, that "[n]o county, city, town, or other municipal corporation shall impose any tax, fee, or charge, either direct or indirect, on the. . .subdivision, classification or reclassification of land. However, this section does not preclude dedication of land or easements pursuant to RCW 58.17.110 within the proposed development or plat which the county. . .can demonstrate are reasonably necessary as a direct result of the proposed development or plat to which the dedication of land or easement is to apply. This section does not prohibit voluntary agreements with counties. . .that allow a payment in lieu of land dedication or to mitigate a direct impact that has been identified as a consequence of a proposed development, subdivision, or plat. . . ." Said law also provides guidance regarding voluntary agreements and deals with certain other topics. It is official county policy that Title 26B SCC, as revised and updated in April of 1982 and July of 1983, is in compliance with Chapter 49, Laws of Washington, 1982, 1st. Ex. Session.

8. Title 26B SCC (commonly known as the County Road Ordinance) requires certain actions by applicants dependent upon the computed Level of Service (LOS) of adjacent road systems. The term "road system" is defined within Title 26B SCC as "those existing or proposed county roads (if any) which are located in the development site and/or between the development site and the nearest state highway or highways, *projected to be utilized by ten percent or more of the traffic*

generated by the development." [SCC 26B.51.080, emphasis added]

9. "In order to provide sufficient information to assess a development impact on the transportation system and level of traffic service, the director [of the Department of Public Works (DPW)] or following hearing, the hearing examiner, planning commission, county legislative authority, or other county hearing body, may require a traffic study. This decision will be based upon the size of the development proposal, availability of previous studies in the same area, existing roadway conditions, traffic volumes, accident history, expressed community concern and other factors relating to transportation." [26B.53.010] When a traffic analysis (also commonly known as a traffic study) is required it is to be prepared by a professional [SCC 26.B.53.020] and must contain certain items [SCC 26B.53.030]. One of the required elements is an analysis of the LOS for both the current traffic situation in the area of the proposed project and the projected situation upon completion of the project. If completion is to be more than two years away, a growth projection for other development in the vicinity must also be included [SCC 26B.53.030(1)(f)(iii)]. Furthermore, traffic volumes must be projected for 10 years into the future unless future phases of the proposed development would extend beyond 10 years, in which case the projection must continue on to the estimated completion of the development [SCC 26B.53.030(1)(h)].

10. When the traffic study indicates that an off-site traffic impact would be created or exacerbated by a particular development, the applicant for that development "must submit a written proposal to fulfill [his] obligations under [Title 26B SCC] to the [DPW] in conjunction with [his] traffic study if required, or in any event sufficiently far enough in advance of a public hearing. . .to allow review and recommendations by the

[DPW] and hearing body." [SCC 26B.55.010(3)] Title 26B SCC requires that "the cost estimate for, method of completion of, and level of improvement required for a development will be. . .established by the county authority issuing the. . .approval. . . . Facilities shall be designed so that in general no more than five hundred (500) vehicles per lane are projected for the thirtieth (30th) highest hour of the design year (twenty (20) years hence), unless for good cause the county finds that a different design volume should be employed." [SCC 26B.54.020].

11. The timing and method of obligation fulfillment differs according to the type of permit or approval being sought and is stipulated in Chapter 26B.55 SCC. Generally speaking, obligations are to be imposed as a condition of preliminary plat approval for execution and/or fulfillment prior to plat recordation, are to be executed prior to the effective date of a rezone, are to be imposed as a condition on the issuance of a conditional or special use permit to be fulfilled or executed prior to building permit issuance or are to be executed and fulfilled prior to building permit issuance, whichever comes first [SCC 26B.55.030(2), .040(5), (6) and (7) and .050].

12. Several items pertaining to the traffic impact associated with the project have been submitted during the course of the application's processing:

    A. The first traffic submittal was received by the PD on June 7, 1984 in which the applicant stated that eight additional personnel would be hired, that the facility would contain between 66 and 77 living units, that the present kitchen facilities for the day-care center would be shifted into the new activity building, that two accesses onto 164th were desired, that the driveway on the south side of the church

between the two accesses would be left, that presently owned school vans would be used to take residents on shopping and other trips and that only limited traffic impact would result (Exhibit 21).

B. On June 29, 1984 a series of traffic counts taken by the day-care center's bookkeeper were submitted. Said counts indicate that weekday traffic ranges from approximately 650 to slightly over 1,000 trips per day, that Saturday day-care traffic normally amounts to approximately 200-300 trips per day and that Sunday church traffic amounts to between 74 and 176 trips. Attached to the traffic counts was a copy of a traffic study done by a registered engineer for a retirement center in Renton (Exhibit 18).

C. On October 30, 1984 the applicant presented an offer to the DPW for fulfillment of its obligations under Title 26B SCC. The applicant offered to deed 10 feet of r/w along the property's frontage on both Motor Place and 13th Avenue W, 20 feet of r/w along the property's frontage on 164th Street SW, to construct curb, gutter and sidewalk along the frontages on both Motor Place and 13th Avenue W and to provide a 25 foot r/w from all three road frontages to the parcel which was going to be deeded over to the retirement center (Exhibit 25).

D. On November 13, 1984 the DPW stated that the applicant's offer was acceptable (Exhibit 26).

E. On December 14, 1984 the DPW submitted a memorandum noting several LOS "D" and "E" situations and concluding that in addition

to the previously identified obligations, the applicant would also have to agree to fund the complete relocation of the curb, gutter and sidewalk along the property's frontage on 164th Street SW (Exhibit 33).

F. On December 14, 1984 the Washington State Department of Transportation (WSDOT) stated that the 164th Street SW/I-5 interchange presently operates at LOS "E" during the peak hour. Based upon conversations with the DPW, the WSDOT concluded that participation in interchange improvements would not be necessary (Exhibit 35).

G. On February 4, 1985 the applicant submitted a statement which indicated that only approximately two-thirds of the state licensed day-care capacity of 230 children per hour was presently in use. The applicant stated that if the 77 unit retirement home were not to be approved, it would increase its advertising for the day-care center to generate as high a volume of activity in that facility as the license would allow. The applicant argued that by constructing the retirement center it would be decreasing the potential traffic associated with the site by approximately 550-600 vehicle trips per day (Exhibit 38).

H. On February 6, 1985 the DPW submitted a revised report and recommendation in which it indicated that the application should not be approved and that the hearing should be postponed until November, 1985 (Exhibit 42). The PD concurs with the DPW recommendation (Exhibit 43).

13. 164th Street SW/SE has been determined in at least six previous cases to be an inadequate roadway suf-

fering from not only deficient LOSs at critical points but also from inadequate (hazardous) conditions associated with left turn movements (See Mt. Pacific Development Corporation rezone, ZA 8310252; Martha Crest preliminary plat, ZA 8401021; Balser Investments rezone and plat, ZA 8407184; Fitzgarrald rezone, ZA 8310231; and the recent (January 29, 1985) Radovich conditional use permit, ZA 8409222, and (February 4, 1985) Nancy Partnership conditional use permit, ZA 8409236). The issue of road inadequacy was challenged through an appeal to the County Council in both the Mt. Pacific Development Corporation and Martha Crest cases; the Council sustained the conclusion regarding road inadequacy in both appeals.

14. The present LOS at key intersections on 164th Street is "D" or "E". Improvements now underway (See Finding 16, below) will raise the LOS of some of the intersections but will not permanently alleviate the deficiencies.

15. "Developers whose projects will be served by a road system which will be at a level of service of E or below following completion of the development, or which will cause or exacerbate an inadequate road condition shall incur an obligation which may be fulfilled" either by forming an RID for full improvement or by voluntarily agreeing to pay a "proportionate share of the cost of mitigation improvements in accordance with" Title 26B SCC. Development permits may not be issued until the road work is funded and under contract or construction; occupancy may not occur until the improvements have been completed. [SCC 26B.55.050 with references to SCC 26B.55.040]

16. The DPW is in the process of installing signals on 164th Street at 10th Avenue W (Larch Way), North Road and 3rd Avenue SE. The Examiner takes official notice that said signals were to have been fully in-

stalled by October, 1984; due to delays, the signals were not scheduled to become operational until February 7, 1985. No left turn lanes are included in the present signalization project. The existing signalized intersection at 13th Avenue W has been improved by the addition of left turn lanes on the east and west legs of said intersection.

17. The most recent DPW memorandum (Exhibit 42) includes as an attachment a statement presented by the DPW to the County Council on or around January 30, 1985. In said statement, the DPW makes note of the fact that the present volumes on 164th Street SW/SE exceed the highway's capacity and that the "lack of an adequate combination of separate left-turn lanes, traffic signal control systems, controlled left-turn movements and controlled property access traffic has created an unsatisfactory level of service and unsafe traffic conditions throughout the corridor." Said statement indicates that the previously identified road inadequacies still continue to exist. The county has funded a full corridor study which is now underway. The DPW anticipates that said study will be completed during the first half of 1985 and that the DPW will be prepared to present a recommendation to the County Council regarding corridor improvements during the second half of 1985.

18. The PUD has indicated that adequate electrical service can be provided to the instant development with distribution facilities as they presently exist (Exhibit 17).

19. The City of Lynnwood has submitted two comments during the review process which indicate that the City has no objection (Exhibit 28) and recommends approval (Exhibit 12).

20. One letter of support from a resident in the Martha Lake area was submitted (Exhibit 41). Letters, statements and petitions in opposition to any new devel-

opment on 164th Street SW/SE without concurrent road improvements were submitted by the Martha Lake Homeowners' Association, the Martha Lake Community Club and many area residents (Exhibits 30 and 44-50). Several of said exhibits challenge the appropriateness of the PD's Determination of Nonsignificance.

21. At the close of the Examiner's hearing on February 7, 1985 the applicant asked that the Examiner either approve the permit or deny it. The applicant indicated that a firm decision was needed in order to make financing plans.

PART III. CONCLUSIONS

Traffic and SEPA

1. Title 26B SCC is an ordinance of the county which, like all other ordinances, requires that its standards be followed. Title 26B SCC establishes a hierarchical system of determining road improvement obligations: if the road system that would serve a project is adequate, then no developer funded off-site road improvements are necessary; if the road system is inadequate either because of some hazardous condition or because of excessive traffic volumes, then no development is to go forward until improvements have been guaranteed. Every project which this Examiner reviews must stand scrutiny under Title 26B SCC as well as under any other applicable county ordinance. In the instant case, the off-site road conditions are such that compliance with Title 26B SCC becomes the most critical matter in the application.

2. 164th Street SW/SE has been declared to be an inadequate roadway because of the hazard associated with left turn movements and the high volume of traffic. Evidence entered into those cases cited in Finding 13, above, has proven to the satisfaction of

this Examiner and to the satisfaction of the Council that the present inadequate situation will not be alleviated simply by the installation of traffic signals. Both the Examiner and the Council have been convinced that left turn lanes/pockets would also be necessary in order to provide a safe haven for those many motorists who have to make left turns across two lanes of oncoming traffic. It is worth note that the DPW, which prior to the Radovich case held the position that the installation of turn signals at three intersections on 164th Street SW by themselves would remove the inadequacy, has recently substantially changes its positon because of actual experience with the turn signal situation at 13th Avenue W. We now have a situation in which the Examiner, the Council and the DPW all agree that mere installation of traffic signals will not alleviate the present inadequate conditions on 164th Street. Evidence in the instant case supports the same conclusion. Under Title 26B, any development which would exacerbate the present situation cannot be approved unless specific provisions are made to alleviate the hazard.

3. Approval of a development which would create the need for left turn movements along 164th Street SW would clearly exacerbate the present inadequate conditions. In fact, it is the existence of left turning movements themselves which have led to the declaration of a road inadequacy.

4. Like the other projects before it, operation of this project will in fact create additional left turning movements. Based upon the applicant's own information in Exhibit 24, the average daily traffic (ADT) associated with the proposed development would be on the order of 462. (Both the arrival and departure of vehicles are counted when calculating ADT. Thus, an employee who drives to work and then drives home counts as 2 ADT; if that employee also left the site by vehicle for lunch

or some other errand once during the day, the ADT attributable to that employee would increase to four. Therefore, the ADT figure in this conclusion is equal to the number of units multiplied by the applicant's statement of three trips per day multiplied by a factor of two.) It is fair to say that a substantial number of those trips will either originate from the west or will have destinations to the east. In either event, left turn and lane crossing movements will be a necessary part of the vehicle trip. The proposed development will exacerbate the present inadequate condition by increasing the number of left turn movements.

5. The materials submitted by the applicant dealing with traffic impact clearly do not rise to the level of a traffic study as that term is used in Chapter 26B.53 SCC nor do they meet any reasonable burden of proof regarding traffic conditions on 164th Street. The submittal of a traffic study prepared for a retirement center in Renton does not in any, shape or form meet the obligation to prepare a traffic study dealing with the situation on 164th Street SW in Snohomish County. The proposal offered by the applicant to mitigate its traffic impact (the deeding of r/w and constructing of frontage improvements) is not a mitigation for an off-site road impact but is, rather, a measure which would be required of any applicant regardless of the off-site LOS.

6. The applicant has implied that approval of the instant proposal would be the lesser of several alternatives, which could include commercial development of the site or further expansion of the day-care facility. The Examiner does not base decisions regarding cases upon a theory of the lesser of two bad situations. In the first place, if any other type of land use were to be proposed for the subject property, it too would have to stand scrutiny under Title 26B SCC. Thus, whether the property is zoned residential, multiple family or

commercial is completely immaterial insofar as justifying approval of the instant proposal is concerned. The applicant's proposal must stand on its own two feet. If that proposal does not meet its obligations and requirements under Title 26B SCC, then it cannot be approved. The applicant's statement regarding a tradeoff of traffic from the retirement center for potential traffic from an expanded day-care center is in essence a veiled threat which does not create a legal justification for ignoring the provisions of Title 26B SCC. There is no adequate evidence in the record to determine the degree to which the day-care center is a nonconforming use. However, the applicant should be aware that the evidence does indicate that there may be a nonconforming element to the day-care center and that if the center is in part nonconforming, it is subject to the expansion limitations of Chapter 18.84 SCC.

7. The Planning Division (PD) of the Department of Planning and Community Development has at least in part based its Determination of Nonsignificance (DNS) upon compliance with Title 26B SCC. The DNS states that mitigation of traffic impact will be accomplished in accordance with said Title "which may include the necessity for immediate or future road improvements as determined by the Department of Public Works prior to final project approval." (Exhibit 8) In defense of the PD's DNS, it must be noted that the DNS was issued on May 7, 1984 prior to the receipt of the most recent DPW position paper (February 6, 1985). (On the other hand, in truth it must also be noted that the DNS was issued well after several of the decisions issued by the Examiner and/or Council referenced in Finding 13, above.) Based upon the evidence and testimony which is now in the record of the instant proceeding, it can no longer be concluded, if in fact it ever could have been, that the proposed development

would have but an insignificant impact upon the conditions on 164th Street. State and county SEPA regulations authorize the issuance of mitigated DNSs in which specific conditions are imposed to mitigate potentially significant impacts. Unfortunately, a statement that impacts will be mitigated by some unknown improvements carried out under Title 26B SCC cannot begin to pass muster as a mitigation measure on a mitigated DNS. The present DNS must therefore be rejected based upon the present knowledge regarding traffic impacts on 164th Street. Until a revised DNS or a Determination of Significance with its attendant environmental impact statement has been prepared, the county can take no action to approve the instant proposal.

8. The DPW concludes its recommendation (Exhibit 42) by suggesting that the case be continued to a date in November. From a procedural perspective, it is impossible to continue the hearing at this time: the applicant had every available opportunity to ask for a continuance during the February 7, 1985 hearing but chose not to do so. As has been indicated, the applicant asked for the hearing and decision making process to go forward. Thus, the Examiner must take one of the actions called for by Chapter 2.02 SCC: either grant, grant with conditions, deny or return the application to the applicant for modification [SCC 2.02.150(2)]. Because of the deficiencies in the DNS and the failure to comply with the requirements of Title 26B SCC, the most appropriate course of action would be to return the application to the applicant. The Examiner recognizes that the applicant asked for either an approval or an outright denial. Nevertheless, it does not seem appropriate to deny the application outright when in fact it may yet be possible to grant approval.

9. It is perhaps unfortunate from the applicant's perspective that the case was not able to be handled in

a more expeditious fashion. Much of the blame for that situation, however, rests with the applicant due to its changing of the application during the spring and summer of 1984 and its failure to make proper submittals as required by Title 26B SCC. That the DPW has found it necessary to change its position from that which it held earlier in the application process is quite simply a graphic indication of the rapidity with which the traffic situation on 164th Street has deteriorated and the growing magnitude of the problem on 164th Street.

Other Considerations

10. Because of the traffic conditions on 164th Street SW and the failure to comply with Title 26B SCC, it is impossible to approve the application at this time. There are some other issues, however, which while not entering into the decision at this time may well become significant considerations in the future. The following four conclusions discuss each such issue.

11. There is a nagging doubt in the Examiner's mind that the proposed facility is even allowed in the RR 9600 zone. The provision which has been relied upon thus far is SCC 18.18.030 which states that "hospitals, sanitariums and rest homes" may be permitted in the RR 9600 zone as a conditional use. "'Sanitarium and/or rest home' means a structure and/or premises for nursing, dietary care and other personal services rendered to convalescents, invalids and aged persons, but excluding contagious, communicable, or mental disease cases and surgery or primary treatments such as are customarily provided for in hospitals." [SCC 18.08.540] It is obvious from both the layout of the floor plan and the testimony and evidence presented by the applicant that those persons residing in the proposed retirement home will be fully capable of taking care of themselves. The very fact that there will only be

five to eight employees directly associated with the proposed facility makes it clear that intensive nursing or theraputic care is not going to be provided. (A recent nursing home application indicated that there would be some 70 employees involved in providing 24 hour-a-day care to approximately 124 residents.) The question arises as to whether or not the proposed facility is in fact a multiple family dwelling of some type. For example, a boarding house is "a building, other than a hotel, where meals, and lodging are provided for compensation to nontransient persons." [SCC 18.08.105] A multiple family dwelling is "a dwelling containing two or more dwelling units" [SCC 18.08.220] and, when the definitions for dwelling, dwelling unit, family and kitchen are combined, one finds that a dwelling unit is "one or more rooms in a. . .structure designed or used for residential purposes. . .designed for occupancy by. . .one or more persons related by blood, marriage, adoption,. . .for living or sleeping purposes and having not more than one. . .room used or intended or designed to be used for cooking or preparation of food." [SCC 18.08.210, .230, .245 and .380] The proposed facility would seem to have more of the characteristics of a boarding house or multiple family dwelling than it would of a rest home. In fact, the association of the phrase "rest home" with hospitals and sanitariums in the conditional use clause would seem to suggest that rest homes as contemplated within the Snohomish County zoning code do not include retirement homes or centers. The PD should carefully evaluate the precise nature of the application and the limitations of the county zoning code prior to any further consideration of this application by the Examiner.

12. A second concern is the intensity of and relationship among the several site uses on the subject property. If the retirement center were to be approved, the 4.89

acres would contain a retirement home for 77 couples, a day-care center handling hundreds of children per day, a church, a "family center" and a caretaker's residence. The retirement center would eliminate virtually all of the play area that is now available to the day-care center, would eliminate at least one of the buildings now used by the day-care center would eliminate both of the commercial coaches used by the day-care center and would substantially reduce the church's ability to carry forward with its approved expansion program on the remaining undeveloped part of the site. The relationship among and between these various tenants on the property is confusing at best. Finally, the use of the "interim church & employee parking" area is extremely unclear. It may well be that the applicant is simply trying to put too many things on too small a piece of property.

13. A third concern is the great bulk of the proposed structure. Granting that the building embodies a pleasing architectural design (See the rendering in Exhibit 55), the building is nevertheless nearly as long as a football field and just barely meets height limitations of the RR 9600 zone. In fact, in order to technically comply with the height limitations, the south side of the building is proposed to be regraded across its entire face. From existing and future single family residences on the north, the structure will appear as a solid mass ranging in height from 25-36 feet. In order to get the number of units on the site that the applicant is seeking, the setbacks (30 feet on the north and east) have been made as small the code allows for rest homes.

14. A fourth consideration is the prospect of future subdivision of the site. In Exhibit 25 the applicant states that title to the north three acres of the site would be given to the retirement center and that 25 foot access easements would be provided from the center's

property to each of the three abutting public streets. Such a transfer of title to a portion of the property would of necessity require the filing of a short subdivision or formal plat. The creation of easements across the remainder of the property could potentially create setback problems since an easement creates a front yard setback under county zoning code requirements. If a property line were to be drawn between the activity building and the north end of the present church structure, it is probable that the code requirement for a 30 foot setback for the rest home from that line and a 25 foot setback from the church to that line could not possibly be met. The entire circulation and parking concept on the site would appear to be so inextricably intertwined as to be impossible to separate by transfer of ownership. Finally, there are at least two underlying conditional use permits affecting portions of the subject property which could be compromised by a transfer of ownership of part of the site.

Summary

15. Because there now exists and will continue to exist an inadequate road condition on 164th Street SW, because the proposed retirement home would generate left turning movement on to and off of 164th Street SW, because the major cause of the inadequacy on 164th Street SW is the lack of adequate left turn facilities, because additional left turning traffic would exacerbate the present inadequacy, because the applicant has not met its legal obligations under Title 26B SCC and because the DNS has been issued predicated upon unspecified solution of the road inadequacy, the application cannot be approved at this time.

PART IV: DISPOSITION

The Examiner hereby RETURNS the requested CONDITIONAL USE PERMIT application to the applicant for com-

pliance with the requirements of Title 26B SCC and for reevaluation by county staff of the SEPA threshold determination.

Decision issued this 22nd day of February, 1985.

/s/ John E. Galt
John E. Galt, Hearing Examiner

* * * * * *

***** NOTICE to PARTIES of RECORD *****

The above decision of the Hearing Examiner is final unless appealed to the County Council. Any appeal must be filed in writing with the Department of Planning and Community Development, 4th floor, County Administration Building, Everett, Washington 98201, no later than 5:00 p.m. on March 4, 1985, must contain a brief statement of the reason why error is assigned to the Examiner's decision and must be accompanied by a fee of $50.00: Provided, that the fee will not be charged to a department of the county or to other than the first appellant. Please use the county file number on all future correspondence with the county regarding this case.

Mailed on February 22, 1985 to:

APPLICANT:

Lutheran Day Care

OTHER PARTIES OF RECORD:

Wayne A. Hoskin	Donald E. Counsell
Richard H. Mullen	Louis E. Bratz, Jr.
Frances Mann	Loretta Bennett
Mrs. George A. Patterson	Helen Trotmark
Diane McClary	Louise Portch

Jerry Bergsman	Wm. J. Kemper

OTHER PARTIES:

Planning Division	Community Development Division
Department of Public Works	City of Lynnwood

APPENDIX U

WASHINGTON REVISED CODE

* * * *

. . .

7.16.010 Parties, how designated. The party prosecuting a special proceeding may be known as the plaintiff and the adverse party as the defendant.

7.16.020 Judgment, motion and order defined. A judgment in a special proceeding is the final determination of the rights of the parties therein. The definitions of a motion and an order in a civil action are applicable to similar acts in a special proceeding.

CERTIORARI

7.16.030 Certiorari defined. The writ of certiorari may be denominated the writ of review.

7.16.040 Grounds for granting writ. A writ of review shall be granted by any court, except a municipal or district court, when an inferior tribunal, board or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board or officer, or one acting illegally, or to correct any erroneous or void proceeding, or a proceeding not according to the course of the common law, and there is no appeal, nor in the judgment of the court, any plain, speedy and adequate remedy at law.

7.16.050 Application for writ—Notice. The application must be made of affidavit by the party beneficially interested, and the court may require a notice of the application to be given to the adverse party, or may grant an order to show cause why it should not be allowed, or may grant the writ without notice.

7.16.060 Writ, to whom directed. The writ may be directed to the inferior tribunal, board or officer, or to any other person having the custody of the record or pro-

ceedings to be certified. When directed to a tribunal the clerk, if there be one, must return the writ with the transcript required.

7.16.070 Contents of writ. The writ of review must command the party to whom it is directed to certify fully to the court issuing the writ, at a specified time and place, a transcript of the record and proceedings (describing or referring to them with convenient certainty), that the same may be reviewed by the court, and requiring the party, in the meantime, to desist from further proceedings in the matter to be reviewed.

7.16.080 Stay of proceedings. If a stay of proceedings be not intended, the words requiring the stay must be omitted from the writ. These words may be inserted or omitted, in the sound discretion of the court, but if omitted the power of the inferior court or office is not suspended or the proceedings stayed.

7.16.100 Service of writ. The writ may be served as follows, except where different directions respecting the mode of service thereof are given by the court granting it:

(1) Where it is directed to a person or persons by name or by his or her official title or titles, or to a municipal corporation, it must be served upon each officer or other person to whom it is directed, or upon the corporation, in the same manner as a summons.

(2) Where it is directed to a court, or to the judges of a court, having a clerk appointed pursuant to law, service upon the court or the judges thereof may be made by filing the writ with the clerk.

7.16.110 Defective return—**Further return—Hearing—Judgment.** If the return of the writ be defective, the court may order a further return to be made. When a full return has been made, the court must hear the parties, or such of them as may attend for that purpose, and may there-

upon give judgment, either affirming or annulling or modifying the proceedings below.

7.16.120 Questions involving merits to be determined. The questions involving the merits to be determined by the court upon the hearing are:

(1) Whether the body or officer had jurisdiction of the subject matter of the determination under review.

(2) Whether the authority, conferred upon the body or officer in relation to that subject matter, has been pursued in the mode required by law, in order to authorize it or to make the determination.

(3) Whether, in making the determination, any rule of law affecting the rights of the parties thereto has been violated to the prejudice of the relator.

(4) Whether there was any competent proof of all the facts necessary to be proved, in order to authorize the making of the determination.

(5) Whether the factual determinations were supported by substantial evidence.*

*Laws 1989, ch. 7, § 1, rewrote subsec. (5), which previously read: "If there was such proof, whether there was, upon all the evidence, such a preponderance of proof, against the existence thereof, rendered in an action in a court, triable by a jury, as would be set aside by the court, as against the weight of evidence."

7.16.130 Copy of judgment to inferior tribunal, board, or officer. A copy of the judgment signed by the clerk, must be transmitted to the inferior tribunal, board or officer having the custody of the record or proceeding certified up.

7.16.140 Judgment roll. A copy of the judgment signed by the clerk, entered upon or attached to the writ and return, constitute the judgment roll.

* * * *

36.70.020 Definitions. The following words or terms

as used in this chapter shall have the following meaning unless a different meaning is clearly indicated by the context:

* * * *

(7) "Conditional use" means a use listed among those classified in any given zone but permitted to locate only after review by the board of adjustment, or zoning adjustor if there be such, and the granting of a conditional use permit imposing such performance standards as will make the use compatible with other permitted uses in the same vicinity and zone and assure against imposing excessive demands upon public utilities, provided the county ordinances specify the standards and criteria that shall be applied.

* * * *

36.70.810 Board of adjustment—Authority. The board of adjustment, subject to appropriate conditions and safeguards as provided by the zoning ordinance or the ordinance establishing the board of adjustment, if there be such, shall hear and decide:

(1) Applications for conditional uses or other permits when the zoning ordinance sets forth the specific uses to be made subject to conditional use permits and establishes criteria for determining the conditions to be imposed;

* * * *

36.70.820 Board of adjustment—Quasi judicial powers. The board of adjustment may also exercise such other quasi judicial powers as may be granted by county ordinance.

* * * *

36.70.870 Zoning adjustors—Powers and duties. If the office of zoning adjustor is established as provided in this chapter, all of the provisions of this chapter defining the powers, duties, and procedures of the board of adjustment shall also apply to the zoning adjustor.

* * * *

36.70.970 Hearing examiner system—Adoption authorized—Alternative—Functions—Procedures. As an alternative to those provisions of this chapter relating to powers or duties of the planning commission to hear and issue recommendations on applications for plat approval and applications for amendments to the zoning ordinance, the county legislative authority may adopt a hearing examiner system under which a hearing examiner or hearing examiners may hear and issue decisions on proposals for plat approval for amendments to the zoning ordinance when the amendment which is applied for is not of general applicability. In addition, the legislative authority may vest in a hearing examiner the power to hear and decide conditional use applications, variance applications, applications for shoreline permits or any other class of applications for or pertaining to land uses. The legislative authority shall prescribe procedures to be followed by a hearing examiner.

Any county which vests in a hearing examiner the authority to hear and decide conditional uses and variances shall not be required to have a zoning adjuster or board of adjustment.

Each county legislative authority electing to use a hearing examiner pursuant to this section shall by ordinance specify the legal effect of the decisions made by the examiner. Such legal effect may vary for the different classes of applications decided by the examiner but shall include one of the following:

(1) The decision may be given the effect of a recommendation to the legislative authority;

(2) The decision may be given the effect of an administrative decision appealable within a specified time limit to the legislative authority.

Each final decision of a hearing examiner shall be in writing and shall include findings and conclusions, based on the record, to support the decision. Such findings and conclusions shall also set forth the manner in which the

decision would carry out and conform to the county's comprehensive plan and the county's development regulations. Each final decision of a hearing examiner, unless a longer period is mutually agreed to in writing by the applicant and the hearing examiner, shall be rendered within ten working days following conclusion of all testimony and hearings.

* * * *

42.36.010 Local land use decisions. Application of the appearance of fairness doctrine to local land use decisions shall be limited to the quasi-judicial actions of local decision-making bodies as defined in this section. Quasi-judicial actions of local decision-making bodies are those actions of the legislative body, planning commission, hearing examiner, zoning adjuster, board of adjustment, or boards which determine the legal rights, duties, or privileges of specific parties in a hearing or other contested case proceeding. Quasi-judicial actions do not include the legislative actions adopting, amending, or revising comprehensive, community, or neighborhood plans or other land use planning documents or the adoption of area-wide zoning ordinances or the adoption of a zoning amendment that is of area-wide significance.

42.36.020 Members of local decision-making bodies. No member of a local decision-making body may be disqualified by the appearance of fairness doctrine for conducting the business of his or her office with any constituent on any matter other than a quasi-judicial action then pending before the local legislative body.

42.36.030 Legislative action of local executive or legislative officials. No legislative action taken by a local legislative body, its members, or local executive officials shall be invalidated by an application of the appearance of fairness doctrine.

42.36.040 Public discussion by candidate for public office. Prior to declaring as a candidate for public office

or while campaigning for public office as defined by RCW 42.17.020 (5) and (25) no public discussion or expression of an opinion by a person subsequently elected to a public office, on any pending or proposed quasi-judicial actions, shall be a violation of the appearance of fairness doctrine.

42.36.050 Campaign contributions. A candidate for public office who complies with all provisions of applicable public disclosure and ethics laws shall not be limited from accepting campaign contributions to finance the campaign, including outstanding debts; nor shall it be a violation of the appearance of fairness doctrine to accept such campaign contributions.

42.36.060 Quasi-judicial proceedings—Ex parte communications prohibited, exceptions. During the pendency of any quasi-judicial proceeding, no member of a decision-making body may engage in ex parte communications with opponents or proponents with respect to the proposal which is the subject of the proceeding unless that person:

(1) Places on the record the substance of any written or oral ex parte communications concerning the decision of action; and

(2) Provides that a public announcement of the content of the communication and of the parties' rights to rebut the substance of the communication shall be made at each hearing where action is considered or taken on the subject to which the communication related. This prohibition does not preclude a member of a decision-making body from seeking in a public hearing specific information or data from such parties relative to the decision if both the request and the results are a part of the record. Nor does such prohibition preclude correspondence between a citizen and his or her elected official if any such correspondence is made a part of the record when it pertains to the subject matter of a quasi-judicial proceeding.

42.36.070 Quasi-judicial proceedings—Prior advisory proceedings. Participation by a member of a decision-mak-

ing body in earlier proceedings that result in an advisory recommendation to a decision-making body shall not disqualify that person from participating in any subsequent quasi-judicial proceeding.

42.36.080 Disqualification based on doctrine—Time limitation for raising challenge. Anyone seeking to rely on the appearance of fairness doctrine to disqualify a member of a decision-making body from participating in a decision must raise the challenge as soon as the basis for disqualification is made known to the individual. Where the basis is known or should reasonably have been known prior to the issuance of a decision and is not raised, it may not be relied on to invalidate the decision.

42.36.090 Participation of challenged member of decision-making body. In the event of a challenge to the member or members of a decision-making body which would cause a lack of a quorum or would result in a failure to obtain a majority vote as required by law, any such challenged member(s) shall be permitted to fully participate in the proceeding and vote as though the challenge had not occurred, if the member or members publicly disclose the basis for disqualification prior to rendering a decision. Such participation shall not subject the decision to a challenge by reason of violation of the appearance of fairness doctrine.

42.36.100 Judicial restriction of doctrine not prohibited—Construction of chapter. Nothing in this chapter prohibits the restriction or elimination of the appearance of fairness doctrine by the appellate courts. Nothing in this chapter may be construed to expand the appearance of fairness doctrine.

42.36.110 Right to fair hearing not impaired. Nothing in this chapter prohibits challenges to local land use decisions where actual violations of an individual's right to a fair hearing can be demonstrated.

42.36.900 Severability—1982 c 229. If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

* * * *

64.40.010 Definitions—Defense in action for damages. As used in this chapter, the terms in this section shall have the meanings indicated unless the context clearly requires otherwise.

(1) "Agency" means the state of Washington, any of its political subdivisions, including any city, town, or county, and any other public body exercising regulatory authority or control over the use of real property in the state.

(2) "Permit" means any governmental approval required by law before an owner of a property interest may improve, sell, transfer, or otherwise put real property to use.

(3) "Property interest" means any interest or right in real property in the state.

(4) "Damages" means reasonable expenses and losses, other than speculative losses or profits, incurred between the time a cause of action arises and the time a holder of an interest in real property is granted relief as provided in RCW 64.40.020. Damages must be caused by an act, necessarily incurred, and actually suffered, realized, or expended, but are not based upon diminution in value of or damage to real property, or litigation expenses.

(5) "Regulation" means any ordinance, resolution, or other rule or regulation adopted pursuant to the authority provided by state law, which imposes or alters restrictions, limitations, or conditions on the use of real property.

(6) "Act" means a final decision by an agency which places requirements, limitations, or conditions upon the use of real property in excess of those allowed by applicable regulations in effect on the date an application for a permit is filed. "Act" also means the failure of an agency to act

within time limits established by law in response to a property owner's application for a permit: *Provided,* That there is no "act" within the meaning of this section when the owner of a property interest agrees in writing to extensions of time, or to the conditions or limitations imposed upon an application for a permit. "Act" shall not include lawful decisions of an agency which are designed to prevent a condition which would constitute a threat to the health, safety, welfare, or morals of residents in the area.

In any action brought pursuant to this chapter, a defense is available to a political subdivision of this state that its act was mandated by a change in statute or state rule or regulation and that such a change became effective subsequent to the filing of an application for a permit.

64.40.020 Applicant for permit—Actions for damages from governmental actions. (1) Owners of a property interest who have filed an application for a permit have an action for damages to obtain relief from acts of an agency which are arbitrary, capricious, unlawful, or exceed lawful authority, or relief from a failure to act within time limits established by law: *Provided,* That the action is unlawful or in excess of lawful authority only if the final decision of the agency was made with knowledge of its unlawfulness or that it was in excess of lawful authority, or it should reasonably have been known to have been unlawful or in excess of lawful authority.

(2) The prevailing party in an action brought pursuant to this chapter may be entitled to reasonable costs and attorney's fees.

(3) No cause of action is created for relief from unintentional procedural or ministerial errors of an agency.

(4) Invalidation of any regulation in effect prior to the date an application for a permit is filed with the agency shall not constitute a cause of action under this chapter.

64.40.030 Commencement of action—Time limitation. Any action to assert claims under the provisions of this

chapter shall be commenced only within thirty days after all administrative remedies have been exhausted.

64.40.040 Remedies cumulative. The remedies provided by this chapter are in addition to any other remedies provided by law.

64.40.900 Severability—1982 c 232. If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

APPENDIX V

SNOHOMISH COUNTY HOME RULE CHARTER (1987)

* * * *

ARTICLE 2—THE LEGISLATIVE BRANCH

Section 2.10 Description

The legislative body shall be the county council.

Section 2.20 Powers

All powers of the county, not reserved by the people or vested in specific offices by this charter, shall be vested in the county council. The county council shall exercise its legislative power by adoption and enactment of ordinances, resolutions and motions. It shall have the power:

1. To levy taxes, appropriate revenue and adopt budgets for the county;

2. To establish the compensation to be paid to all county officials and employees and to provide for the reimbursement of expenses, except that no council member may receive a salary increase for the term of office he holds during which the ordinance is adopted;

3. Except as otherwise provided for herein, to establish by ordinance executive departments and to establish their powers and responsibilities;

4. To adopt by ordinance zoning regulations and other land use and development regulations, including improvement plans for the present and future development of the county;

5. To employ legal counsel as allowed by the laws of the state of Washington;

6. To confirm or reject without cause nominations of members of all county boards and commissions, provided, the county council shall have concurrent authority with the county executive to nominate members of the Snohomish county planning commission;

7. To approve contracts or establish by ordinance methods by which any type of contract shall be approved;

8. To conduct any and all collective bargaining on behalf of the county and county officers as allowed by the laws of the state of Washington.

The enumeration of particular powers shall not be construed as limiting the powers of the county council.

Section 2.30 Composition

The county council shall consist of five members nominated and elected from districts. Councilmembers shall be residents and registered voters of the district they represent at the time of filing for election to said office and at all times during their terms. Any change in the boundaries of a councilmember's district which shall cause him to be no longer a resident shall not disqualify him from holding office during the remainder of the term for which he was elected or appointed.

Section 2.40 Term of Office

The term of office of each councilmember shall be four years following election and until a successor is elected and qualified.

Section 2.50 Organization

The county council shall annually elect one of its members as chair and one as vice-chair who shall act in the absence of the chair. The council shall be responsible for its own organization, the rules of conduct of its business and for the employment and supervision of such persons as it deems necessary to assist it in the performance of its duties. A majority of the council shall constitute a quorum at all meetings. Council action shall require at least a majority of the entire council except as provided by this charter or ordinance.

Section 2.60 Rules of Procedure

The county council shall enact by ordinance rules of procedure governing the time, place and conduct of its meetings and hearings and the introduction, publication, consideration and adoption of ordinances. All meetings shall

be open to the public except to the extent executive sessions are authorized by state law.

Section 2.70 Relationship with other Branches

Except in the performance of its legislative functions under this charter, the county council, its staff, and individual council members shall not interfere in the administration of the executive branch or give orders to or direct, either publicly or privately, any officer or employee subject to the direction and supervision of the county executive or other elected officials. The county executive and county council jointly shall hold biennial public hearings and provide a county operation review forum for public comment on the operation of each county department.

Section 2.80 Council Subpoena Powers

The county council may, in connection with the legislative process, make investigations into the affairs of the county and the conduct of any county department, office or agency and for this purpose may subpoena witnesses, administer oaths, take testimony and require the production of evidence, and may invoke the aid of any court of competent jurisdiction to carry out such powers; provided that any witness shall have the right to be represented by counsel.

Section 2.90 Audit

The county council may conduct or cause to be conducted audits of the financial operations of the county government or any portion thereof. The county council shall conduct or cause to be conducted periodic performance and program audits to review the effectiveness and efficiency of the programs and operations of the county. Annual audits shall continue to be performed by the state in accordance with general law.

Section 2.100 Ordinances—Form

No ordinance shall contain more than one subject which shall be clearly expressed in the title. Ordinances may, by reference, adopt Washington state statutes, or any rec-

ognized, printed codes or compilations in whole or in part. All ordinances of the county of a general and permanent nature shall be incorporated into and become part of a Snohomish County Code. The county council shall establish by ordinance procedures to codify ordinances and to correct deficiencies and conflicts and to remove obsolete provisions from the code. Proposals for enactment of technical revisions to the code shall be submitted to the county council.

Section 2.110 Ordinances—Enactment

Proposed ordinances may be introduced by any councilmember, mini-initiative or initiative. Every proposed ordinance shall be introduced in its entirety in writing. At least thirteen days shall pass between the introduction and the final passage of every ordinance, except emergency ordinances. Brief summaries of proposed ordinances providing reasonable notice as to the nature of the action contemplated shall be published before consideration. The council shall hold at least one public hearing after due notice to consider the proposed ordinance. Any proposed ordinance may be amended by motion at hearing without publication, provided, that such amendments shall not change the scope and object of the proposed ordinance. No proposed ordinance shall become a law unless on its final passage the vote be taken by roll call by yeas and nays. Ordinances, or summaries of them, shall be published after enactment. Except for emergency ordinances, a minimum of three affirmative votes shall be required to adopt an ordinance.

Every ordinance shall be presented to the county executive within five working days after adoption by the county council. Within ten working days after presentation, the county executive shall either sign the ordinance and return it or veto the ordinance and return it to the county council with his written objections. If an ordinance is not returned to the county council within ten working days after its presentation, it shall be deemed enacted

without the county executive's signature. If the county executive vetos an ordinance, the county council shall have thirty days to reconsider the ordinance. If the ordinance receives at least four affirmative votes it shall become law. Except as otherwise provided by this charter, all ordinances shall take effect ten days after they are signed by the county executive or otherwise enacted, or at a later date if stated in the ordinance.

Section 2.115 Ordinances—Amendment, Repeal

No ordinance shall be amended unless the proposed new ordinance sets forth each amended section at full length. The county council in repealing laws shall include in such proposed ordinance references to the law affected. All ordinances which establish programs requiring funding shall provide for repeal on the date six years following enactment unless re-enacted prior to that date.

Section 2.120 Emergency Ordinances

Any proposed ordinance may be enacted as an emergency ordinance if the county council finds as a fact, and states in the ordinance, that the ordinance is necessary for the immediate preservation of public peace, health or safety or for the support of county government and its existing public institutions. A minimum of four affirmative votes shall be required to enact an emergency ordinance. Emergency ordinances shall not be subject to the veto power of the county executive. All emergency ordinances shall be effective immediately upon passage by the county council.

Section 2.130 Resolutions

The county council may pass resolutions to express its opinion concerning any item of business or matter of administration coming within its powers. Resolutions shall not have the force of law, shall not be subject to veto and the county council, in passing resolutions, need not comply with procedure requirements for the introduction, consideration and passage of ordinances.

Section 2.140 Motions

The county council may pass motions to confirm or reject nominations or appointments, to adopt comprehensive plans, to approve interfund loans, to organize and administer the legislative branch, to perform other administrative acts, to issue rulings in quasi-judicial proceedings except rezone actions, and to request information from any other agency of county government. Motions shall not be subject to veto or the requirements for the introduction, consideration and passage of ordinances.

* * * *

APPENDIX W

SNOHOMISH COUNTY, WA., CODE

The following are excerpts from the Snohomish County Code as it existed at the applicable time periods except §§ 2.02.180 and 2.02.190, which are here reproduced as later amended because amendments did not change the relevant provisions.

2.02.010 Purpose. The purpose of this chapter is to establish a quasi-judicial hearing system which will ensure procedural due process and appearance of fairness in regulatory hearings and will provide an efficient and effective hearing process for quasi-judicial matters. (Ord. 80-115 SS2 (part), adopted December 29, 1980).

2.02.020 Creation of hearing examiner. Pursuant to those powers inherent in the home rule charter county, the office of Snohomish county hearing examiner, hereinafter referred to as examiner, is hereby created. The examiner shall interpret, review and implement land use regulations as provided by ordinance and may perform such other quasi-judicial functions as are delegated by ordinance. Unless the context requires otherwise, the term examiner as used herein shall include deputy examiners and examiners pro tem. (Ord. 80-115 SS1 (part), adopted December 29, 1980).

2.02.060 Freedom from improper influence. No person, including county officials, elected or appointed, shall attempt to influence an examiner in any matter pending before him, except at a public hearing duly called for such purpose, or to interfere with an examiner in the performance of his duties in any other way; provided, that this section shall not prohibit the county prosecuting attorney from rendering legal service to the examiner upon request. (Ord. 80-115 SS1 (part), adopted December 29, 1980).

2.02.100 Powers. The examiner shall have authority to:

(1) Receive and examine available information,
(2) Conduct public hearings and prepare a record thereof,
(3) Administer oaths and affirmations,
(4) Examine witnesses, provided that no person shall be compelled to divulge information which he or she could not be compelled to divulge in a court of law,
(5) Regulate the course of the hearing,
(6) Make and enter decisions,
(7) At the examiner's discretion, hold conferences for the settlement or simplification of the issues,
(8) Dispose of procedural requests or similar matters,
(9) Issue summary orders in supplementary proceedings, and
(10) Take any other action authorized by or necessary to carry out this chapter.

The above authorities may be exercised on all matters for which jurisdiction is assigned either by county ordinance or by other legal action of the county or its elected officials. The examiner's decision shall be final and conclusive with right of appeal to the council or court. The nature of the examiner's decision shall be as specified in this chapter and in each ordinance which grants jurisdiction. (Ord. 80-115 SS1 (part), adopted December 29, 1980; Amended Ord 85-105, Sec. 1, December 4, 1985).

2.02.180 Council consideration.

(1) An examiner decision which has been timely appealed pursuant to SCC 2.02.170 shall come on for council consideration in open public meeting no sooner than twenty-one nor longer than thirty-five calendar days from the date the appeal was filed. The council shall consider the matter based upon the record before the examiner, the examiner's decision, the written appeal statement and any written comments received by the council before closure of the

council's office seven days prior to the public meeting date set for council consideration.

(2) At the public meeting the council may concur with the finding and conclusions of the examiner and affirm the examiner's decision; remand the matter to the examiner for further proceedings in accordance with the council's findings and conclusions; or the council may determine to hear the appeal at public hearing. In those instances in which the council affirms the examiner's decision or remands the matter to the examiner, the council's decision shall be reduced to writing and entered into the record of the proceedings within fifteen days of the public meeting. Copies of the decision shall be mailed to all parties of record.

(3) In those instances in which the council determines to conduct a public hearing, notice of the hearing shall be given by publication in the county newspaper no less than ten days prior to the date set for hearing and written notice shall also be given by the council by mail to all parties of record before the hearing examiner.

(4) All council hearings conducted pursuant to this section shall be de novo and shall be limited to those matters raised in the appeal. The council shall consider the appeal based upon the record before the examiner and all written and oral testimony presented at the council hearing. All testimony at any public hearing shall be taken under oath.

(5) At the conclusion of the public hearing, the council shall enter its decision which shall set forth the findings and conclusions of the council in support of its decision. The council may adopt any or all of the findings or conclusions of the examiner which support the council's decision. The council may affirm the decision of the examiner, reverse the decision of the examiner either wholly or in part, or may remand the matter to the examiner for further proceedings in accordance with the council's findings and conclusions.

(6) The council's decision shall be reduced to writing and entered into the record of the proceedings within fifteen days of the conclusion of the hearing. Copies of the decision shall be mailed to all parties of record. (Ord 80-115 SS1 (part), adopted December 29, 1980; Amended Ord 84-116, November 7, 1984; Amended Ord 85-105, Sec. 7, December 4, 1985; Amended Ord 86-009, February 26, 1986; Amended Ord 88-041, Sec. 1, June 22, 1988).

2.02.190 Effect of council action. The council's decision to affirm an examiner decision or remand a matter to the examiner pursuant to SCC 2.02.180(2), or the council's decision after public hearing on an appeal, shall be final and conclusive with right of appeal to the superior court of Snohomish county by writ of certiorari, writ of prohibition or writ of mandamus with fifteen calendar days of the council's decision. The cost of transcription of all records ordered certified by the court for such review shall be borne by the applicant for the writ. (Ord. 80-115 SS1 (part), adopted December 29, 1980; Amended Ord 85-105, December 4, 1985; Amended Ord 88-041, Sec. 2, June 22, 1988).

18.08.190 Conditional use. "Conditional use" means a use listed among those classified in any given use zone but permitted to locate only after review by the hearing examiner and the granting of a conditional use permit imposing such performance standards as will make the use compatible with other permitted uses in the same vicinity and zone and assure against imposing excessive demands upon public utilities. (Sec. 4 of Ord. 80-115 adopted December 29, 1980: 2.04 (part) of Res. adopted January 31, 1966).

18.08.540 Sanitarium and/or rest home. "Sanitarium and/or rest home" means a structure and/or premises for nursing, dietary care and other personal services rendered to convalescents, invalids and aged persons, but excluding contagious, communicable, or mental disease cases and sur-

gery or primary treatments such as are customarily provided for in hospitals. (2.20 (part) of Res. adopted January 31, 1966).

18.18.010 Purpose. The purpose and function of the rural residential 8400 (RR 8400) zone is to provide for and protect areas for a land development density designed to meet contemporary building and living standards primarily on the fringes of intense residential development or where public sanitary facilities are provided. The uses permitted under Section 18.18.020, or for which a valid conditional use permit or variance has been obtained, or which are a valid nonconforming use, shall be the only uses permitted. (4 of Res. adopted January 31, 1966).

18.18.030 Conditional uses. Because of their size or effect upon the surrounding property, the following uses of land will only be permitted upon issuance of a conditional use permit. The purpose of this section is to better protect the higher uses of land and assist the stabilization of property values, and to further the purpose as set forth in Section 18.04.010.

. . .

(7) Hospitals, sanitariums, and rest homes provided that:
A. No building shall be closer than thirty feet to the external boundaries of the property.

18.20.010 Purpose. The purpose and function of the rural residential 9600 (RR 9600) zone is to provide a low density development, chiefly in outlying areas or where required by soil conditions or topography, and is designed to meet the need of a transitional zone between the higher density RR 8400 and RR 12,500. The uses permitted under Section 18.20.020, or for which a valid conditional use permit or variance has been obtained, or which are a valid nonconforming use shall be the only uses permitted. (5 of Res. adopted January 31, 1966).

18.20.030 Conditional uses. Any use permitted by Section 18.18.030 upon the same terms and conditions as set forth in that section is permitted as a conditional use in an RR 9600 zone. (5.02 of Res. adopted January 31, 1966).

18.88.060 Conditional and Special Use Permits – Conditions for granting. When considering an application for a conditional use permit, the examiner shall consider the applicable standards, criteria and policies established by this title as they pertain to the proposed use and may impose specific conditions precedent to establishing the use. The conditions may:

(1) Increase requirements in the standards, criteria or policies established by this title;

(2) Stipulate the exact location as a means of minimizing hazards to life, limb, property damage, erosion, landslides or traffic;

(3) Require structural features or equipment essential to serve the same purpose set forth in (2) above;

(4) Impose conditions similar to those set forth in items (2) and (3) above as deemed necessary to establish parity with uses permitted in the same zone in their freedom from nuisance generating features in matters of noise, odors, air pollution, wastes, vibration, traffic, physical hazards, and similar matters; provided, the hearing examiner may not, in connection with action on a conditional use permit, reduce the requirements specified by this title as pertaining to any use nor otherwise reduce the requirements of this title in matters for which a variance is the remedy provided;

(5) Assure that the degree of compatibility with the purpose of this title shall be maintained with respect to the particular use on the particular site and in consideration of other existing and potential uses, within the general area in which the use is proposed to be located.

(6) Recognize and compensate for variations and degree of technological processes and equipment as related to the factors of noise, smoke, dust, fumes, vibration, odors, and hazard or public need;

(7) Require the posting of construction and maintenance bonds or other security sufficient to secure to the county the estimated cost of construction and/or installation and maintenance of required improvements.

18.88.070 Conditional and Special Use Permits – Effect of Examiner Decision. The decision of the examiner on a conditional use or special use permit shall be final and conclusive with right of appeal to the council pursuant to Chapter 2.02 SCC. (Sec. 9 of Ord. 85-105 adopted December 4, 1985)

APPENDIX X

THE SUPREME COURT OF WASHINGTON
No. 57610-6

LUTHERAN DAY CARE,

Appellant,

v.

SNOHOMISH COUNTY, ET AL,

Respondents.

Received

AUG 3, 1992

PROSECUTING ATTORNEY
FOR SNOHOMISH COUNTY
CIVIL DIVISION

TIME: ____

ORDER DENYING MOTION FOR RECONSIDERATION

The Court having decided that the respondents' motion for reconsideration be denied,

It is hereby ordeed that the motion is denied.

Dated this 30th day of July, 1992.

/s/ Fred H. Dore
Chief Justice

119 Wn.2d 91

APPENDIX Y

THE SUPREME COURT OF WASHINGTON

No. 57610-6

Snohomish County No. 86-2-06611-8

LUTHERN DAY CARE, a nonprofit corporation,

Appellant,

v.

SNOHOMISH COUNTY; THE SNOHOMISH COUNTY COUNCIL; and THE SNOHOMISH COUNTY HEARING EXAMINER,

Respondents.

RECEIVED

AUG 3 1992

PROSECUTING ATTORNEY FOR SNOHOMISH COUNTY CIVIL DIVISION

TIME: ____

MANDATE

THE STATE OF WASHINGTON TO: The Superior Court of the State of Washington in and for Snohomish County.

This is to certify that the opinion of the Supreme Court of the State of Washington filed on May 14, 1992, became the decision terminating review of this court in the above

entitled cause on July 30, 1992. This cause is mandated to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule of Appellate Procedure 14.3, costs are taxed as follows: Cost will be taxed by Supplemental Judgment. Order Denying Motion for Reconsideration was entered herein on July 30, 1992. Copy attached.

[SEAL]IN TESTIMONY WHEREOF, I have
hereunto set my hand and affixed
the seal of said Court at
Olympia, this 31st day of
July, 1992.

/s/ Ronald R. Carpenter
RONALD R. CARPENTER
Deputy Clerk of the Supreme Court,
State of Washington

cc: Mr. Gregory Bertram
Ms. Sally Hyde
Hon. Seth Dawson
Snohomish County Prosecutor
Ms. Carol Weibel, Deputy
Reporter of Decisions

Supreme Court, U.S.
FILED
DEC 22 1992
OFFICE OF THE CLERK

No. 92-751

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

SNOHOMISH COUNTY; THE SNOHOMISH COUNTY COUNCIL; and the SNOHOMISH COUNTY HEARING EXAMINER,

Petitioners,

v.

LUTHERAN DAY CARE, A NON-PROFIT CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

GREGORY L. BERTRAM
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601 Union Street
Seattle, Washington 98101
(206) 292-1985
Counsel for Respondent.

December 22, 1992

Washington, D.C. • THIEL PRESS • (202) 328-3288

QUESTIONS PRESENTED

1. Does the inability of a party to demonstrate that it has sustained a redressable injury irrevocably barr that party from successfully applying for a Writ of Certiorari to this Court?
2. Is willful, arbitrary and capricious governmental misconduct sufficient to establish a violation of the substantive due process provision of 42 U.S.C. §1983?
3. Where a conditional use permit application constitutes a vested property right under applicable state law, is a governmental entity liable in damages under 42 U.S.C. §1983 for a violation of that property right?

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No. 92-751

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

SNOHOMISH COUNTY; THE SNOHOMISH COUNTY COUNCIL; and the SNOHOMISH COUNTY HEARING EXAMINER,

Petitioners,

v.

LUTHERAN DAY CARE, A NON-PROFIT CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

Petitioner lacks the necessary standing to litigate constitutional issues concerning Respondent before the Court because it cannot demonstrate that it has sustained a redressable injury. The Supreme Court of Washington found Petitioner concurrently liable to the Respondent pursuant to RCW 64.40, *et seq.*, a decision Petitioner cannot appeal further. Alternatively, Petitioner's claims are

not sufficiently ripe to be justiciable in under the facts and circumstances surrounding Petitioner's conduct concerning Respondent.

In addition, the Supreme Court of Washington in *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91 (1992), correctly determined that Petitioner's deliberate, wilful, arbitrary and capricious conduct with respect to Respondent was sufficient to establish its liability for violations of substantive due process under 42 U.S.C. § 1983. Finally, the Supreme Court of Washington specifically and correctly found that Respondent had a protectable property interest of constitutional dimension in its right to a conditional use permit from Petitioner.

REASONS FOR DENYING THE WRIT

I.

THE COUNTY'S PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE PETITIONER CANNOT DEMONSTRATE A REDRESSABLE INJURY AS REQUIRED BY ARTICLE III OF THE CONSTITUTION OF THE UNITED STATES

As an element of standing necessary to litigate matters before the Supreme Court of the United States, the Court has consistently required the demonstration of a redressable injury from the party seeking judicial relief. *See generally, Warth v. Seldin*, 422 U.S. 490 (1974), *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1975). In *Warth v. Seldin, supra*, the petitioners, residents and organizations in the Rochester, New York, area, brought an action against the town of Penfield, New York, and members of Penfield's zoning, planning and town boards asserting that the town zoning ordinance impermissibly excluded individuals of low and moderate

income from living in the town in violation of 42 U.S.C. § 1981, § 1982 and § 1983. The Court dismissed the complaint on the grounds that the petitioners lacked necessary standing in order to proceed.

In *Warth v. Seldin, supra*, the Court stated with respect to standing:

> We address first the principles of standing relevant to the claims asserted by the several categories of petitioners in this case. In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. This inquiry involves both constitutional limitations on federal court-jurisdiction and prudential limitations on its exercise. *E.g., Barrows v. Jackson*, 346 U.S. 249, 255-256 (1953). In both dimensions it is founded in concern about the proper—and properly limited—role of the courts in a democratic society. *See, Schlesinger v. Reservists to Stop the War*, 418 U.S. 208, 221-227 (1974); *United States v. Richardson*, 418 U.S. 166, 188-197 (1974) (POWELL, J. concurring).
>
> In its constitutional dimension, standing imports judiciability: whether the plaintiff has made out a "case or controversy" between himself and the defendant within the meaning of Article III. This is the threshold question in every federal case, determining the power of the court to entertain the suit. As an aspect of judiciability, the standing question is whether the plaintiff has "alleged such a personal stake in the outcome of the controversy" as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf. *Baker v. Carr*, 369 U.S. 186, 204 (1962). The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may

> benefit others collaterally. A federal court-jurisdiction therefore can be invoked only when the plaintiff himself has suffered "some threatened or actual injury resulting from the putatively illegal action . . . ." *Linda R. S. v. Richard D.*, 410 U.S. 614, 617 (1973). *See, Data Processing Service v. Camp*, 397 U.S. 150, 151-154 (1970).

Id., at pp. 498, 499 *[footnotes omitted]*.

Similarly, in *Simon v. Eastern Kentucky Welfare Rights Organization, supra*, the Court dismissed claims of petitioners alleging violations of certain provisions of the Internal Revenue Code of 1954 as amended and the Administrative Procedure Act as a result of issuance by the Internal Revenue Service of a revenue ruling allowing favorable tax treatment to a non-profit hospital that offered emergency room services but not other hospital services to indigents. The claims of petitioners were dismissed on the basis that they lacked standing to assert their claims. The Court commented upon the absolute necessity of the redressability requirement as follows:

> No principle is more fundamental to the judiciary's proper role in our system of government and the constitutional limitation of federal court-jurisdiction to actual cases or controversies. *See, Flast v. Cohen*, 392 U.S. 83, 95 (1968). The concept of standing is part of this limitation. Unlike other associated doctrines, for example, that which restrains federal courts from deciding political questions, standing "focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." *Id.*, at 99. As we reiterated last Term, the standing question in its Art. III aspect "is whether the plaintiff has 'alleged such a personal stake in the outcome in the controversy' as to warrant *his* invocation of federal court-jurisdic-

> tion and to justify exercise of the court's remedial powers on his behalf." *Warth v. Seldin*, 422 U.S. 490, 498-499 (1975), *(emphasis in original). In sum, when a plaintiff's standing is brought into issue, the relevant inquiry is whether, assuming judiciability of the claim, the plaintiff is shown an injury to himself that is likely to be redressed by a favorable decision.* Absent such a showing, exercise of its power by a federal court would be gratuitous and thus inconsistent with Art. III limitation.
>
> . . .
>
> The necessity that the plaintiff who seeks to invoke judicial powers stand to profit in some personal interest remains an Art. III requirement. The federal court cannot ignore this requirement without overstepping its assigned role in our system of adjudicating only actual cases in controversy.

Id., at pp. 37-39 *[emphasis added] [footnotes omitted]*.

In *Simon v. Eastern Kentucky Welfare Rights Organization, supra*, the Court determined that the assertion as to whether the desired exercise of the Court's powers would result in the availability of additional medical or hospital services to the petitioners was speculative at best. The Court further determined that it was equally speculative whether any alleged denials of hospital services to indigents were proximately caused by the tax benefits afforded to the respondent hospitals. The case was thereupon remanded with instructions to the District Court to dismiss the complaint.

Similarly, in *Valley Forge College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1981), the Court found that an association of taxpayers lacked standing to challenge a Department of Health, Education and Welfare transfer of certain real property

to the respondent college, an institution whose primary purpose was to provide instruction of religion. The Court determined that the respondent association of taxpayers was unable to demonstrate any personal injury sustained by them as a result of an alleged violation of the Establishment Clause of the First Amendment. In so holding, the Court stated:

> But neither the counsels of prudence nor the policy is implicit in the "case or controversy" requirement that should be mistaken for the rigorous Article III requirements themselves. Satisfaction of the former cannot substitute for a demonstration of "distinct impalpable injury" . . . that is likely to be redressed if the requested relief is granted. *Gladstone Realtors v. Village of Bellwood*, 441 U.S., at 100 (*quoting Warth v. Seldin, supra*, at 501). That requirement states a limitation on judicial power, not merely a factor to be balanced in the swing of so-called "prudential" considerations.

Id., at p. 475.

The Court rejected the claim of the respondent taxpayer associations that the Establishment Clause created in each citizen a personal constitutional right such that any citizen could contest federal administrative as well as congressional expenditures under the Establishment Clause. The Court's repudiation of that contention was eloquent:

> Implicit in the foregoing is the philosophy that the business of the federal courts is correcting constitutional errors, and that "cases and controversies" are at best merely convenient vehicles for doing so and at worst nuisances that may be dispensed with when they become obstacles to that transcendent endeavor. This philosophy has no place in our constitutional scheme.

Id., at p. 489.

See also, Gladstone Realtors v. Village of Bellwood, 441 U.S. 91 (1979).

Petitioner cannot reasonably demonstrate that it has suffered a redressable injury under the circumstances here. The Supreme Court of Washington imposed liability for damages against Petitioner in favor of Respondent upon alternative grounds. In addition to having imposed liability against Petitioner for violations of 42 U.S.C. § 1983, the Supreme Court of Washington in *Lutheran Day Care v. Snohomish County, supra*, imposed concurrent and alternative liability against Petitioner for the latter's violation of RCW 64.40, *et seq.*, a State of Washington statute that imposes monetary liability against governmental entities for arbitrary and capricious or otherwise unlawful processing of permit applications. In rejecting the Petitioner County's challenge to a trial court level finding that its conduct was arbitrary, capricious or unlawful in violation of RCW 64.40, *et seq.*, the Supreme Court of Washington stated:

> Since the issues are identical in application of the doctrine and will not work an injustice on the County, we hold collateral estoppel prevents relitigation of Judge Kershner's finding that the County acted arbitrarily and capriciously in denying the conditional use permit. The effect of this holding is that, for purposes of this action, such arbitrary and capricious conduct is conclusively established. Since this is all that is required to establish a cause of action under RCW 64.40.020(1), appellant has demonstrated that it does have a cause of action against the County under that statute. Appellant's motion for partial summary judgment, establishing the County's liability under RCW 64.40.010(1) should therefore be granted. Accordingly, we reverse the trial court's denial of appellant's summary judgment

> motion and remand to the trial court with instructions to grant the motion.

Id., at pp. 116 and 117.

RCW 64.40.020(2) also entitled the prevailing parties to an award of reasonable costs and attorney's fees in addition to money damages. The Supreme Court of Washington quite clearly deemed Respondent, Lutheran Day Care, the prevailing party under 42 U.S.C. § 1983 *and* RCW 64.40.020 and awarded Respondent attorney's fees under both statutes. *Id.*, at p. 128. In so holding, the Court stated:

> *Appellant has conclusively established causes of action under RCW 64.40.020(1) and 42 U.S.C. § 1983.*
>
> . . .
>
> We therefore reverse and remand with instructions for the trial court to enter partial summary judgment in favor of appellant on the issue of liability under RCW 64.40.020(1) *and* 42 U.S.C. § 1983.

Id., [emphasis added].

Thus, the Petitioner has been found liable to Respondent for both money damages and attorney's fees upon alternative statutory grounds. Petitioner can no longer appeal from the Supreme Court of Washington decision imposing liability against it in favor of Respondent under RCW 64.40. Petitioner is, therefore, entitled to collect damages and attorney's fees from Respondent in an amount to be established by Respondent at trial.

Under these circumstances, even if this Court is inclined to grant the relief requested by Petitioner, Petitioner's legal liability to Respondent remains fixed. Thus, Petitioner has failed to properly demonstrate a "case or controversy" concerning Respondent that is an absolute necessity under the Court's consistent interpretation of

Article III standing requirements. Its Petition for Writ of Certiorari should, therefore, be denied upon this ground alone.

II.
PETITIONERS' CONSTITUTIONAL CLAIMS ARE NOT SUFFICIENTLY RIPE FOR JUDICIAL REVIEW

In addition to lacking the necessary standing to properly bring its constitutional claims before this Court, Petitioners' claims are also insufficiently ripe for judicial review. *See, Pennell v. City of San Jose*, 485 U.S. 1 (1988); *American-Arab Anti-Discrimination Committee v. Thornburgh*, 940 F.2d 445 (9th Cir. 1991). The matter of "ripeness" has been held to involve two principal considerations: (1) whether the issues are fit for judicial decision and (2) whether the parties will suffer hardship if the Court declines to consider the issues. *See, Abbott Laboratories v. Gardiner*, 387 U.S. 136 (1967) (*overruled on other grounds, Califano v. Sanders*, 430 U.S. 99 (1977); *American-Arab Anti-Discrimination Committee v. Thornburgh, supra*, at p. 453.

Here, Petitioner cannot show that it will suffer hardship in the event this Court declines to reach the merits of Petitioners' constitutional claims. First, Petitioner has already been found liable to Petitioner in damages and attorney's fees for having violated the proscriptions of a Washington statute, RCW 64.40, *et seq.*, against arbitrary and capricious governmental agency conduct in a land use context. Petitioner has not appealed from this determination of the Supreme Court of Washington. Thus, Petitioner cannot possibly demonstrate that it will suffer any hardship within the parameters of its dispute with Respondent irrespective of whether the Court addresses its constitutional claims on the merits.

Petitioner, like Macbeth, is fully aware of its unclean hands as it presents its petition to this Court. However, Petitioner is unable to demonstrate that it will sustain any redressable hardship in the future in the event this Court declines to entertain Petitioners' constitutional claims. Petitioner has no legal right under any known state or federal law, whether statutory law or derived from the common law, to engage in arbitrary or capricious conduct in the course of its administrative decision-making. As Petitioner cannot conceivably demonstrate a constitutionally protectable interest in conducting itself in an arbitrary and capricious manner in any case, present or future, Petitioner cannot properly claim hardship in the event this Court declines to revisit the question of whether arbitrary and capricious governmental misconduct is without more sufficient to trigger a violation of 42 U.S.C. § 1983. Thus, not only are Petitioners' specific claims not ripe for judicial review under the facts presented to the Court by this case, Petitioners' § 1983 claims could never be justiciable when their arbitrary and capricious misconduct has already been judicially established as a matter of fact and law.

III.

PETITIONERS' WILFUL, ARBITRARY AND CAPRICIOUS GOVERNMENTAL MISCONDUCT CLEARLY VIOLATES THE SUBSTANTIVE DUE PROCESS PROTECTIONS OF 42 U.S.C. §1983

Petitioner errs in its assertion that the substantive due process component of 42 U.S.C. § 1983 somehow requires more than arbitrary or capricious governmental entity. In *Lutheran Day Care v. Snohomish County, supra*, the Supreme Court of Washington accurately summarized this Court's holdings with respect to the

degree of required governmental misconduct under 42 U.S.C. § 1983 as follows:

> The Supreme Court has held in *Parratt v. Taylor*, 451 U.S. 527, 68 L.Ed.2d 420, 101 S.Ct. 1908 (1981), overruled in part on other grounds in *Daniels v. Williams*, 474 U.S. 327, 88 L.Ed.2d 662, 106 S.Ct. 662 (1986), that § 1983 imposes no state of mind requirements beyond that necessary to establish the constitutional violation involved. Therefore, if a constitutional violation is shown, relief is available under § 1983, assuming that other prerequisites stating a § 1983 claim have been met.

Id., at p. 124.

This Court has long held that in § 1983 actions that a governmental entity may not assert the defense of good faith if the facts establish wilful, arbitrary or capricious misconduct by its officials. *Owen v. City of Independence, Missouri*, 445 U.S. 621 (1980). There, this Court expressly held that a municipality could not assert a defense of good faith with respect to the conduct of its officers or agents in response to a claim of liability under § 1983. *Id.*, at p. 409. *Owen, supra*, involved an action by the city's former Chief of Police for wrongful discharge in alleged violation of his constitutionally protected procedural and substantive due process rights. This Court reversed a determination by the District Court and Court of Appeals that the respondent city was entitled to qualified immunity from § 1983 liability based upon the good faith of the city's officers or agents. In so holding, the Court reflected upon the common law history of municipality liability prior and subsequent to the enactment of § 1983:

> In sum, we can discern no "tradition so well grounded in history and reason" that would warrant

the conclusion that enacting § 1 of the Civil Rights Act, the 42d Congress sub silentio extended to municipalities a qualified immunity based on the good faith of their officers. Absent any clearer indication that Congress intended to limit the reach of a statute expressly designed to provide a "broad remedy for violations of federally protected civil rights," *Monell v. New York City Dept. of Social Services*, 436 U.S. 685, 98 S.Ct., at 2033, we are unwilling to suppose that injuries occasioned by a municipality's unconstitutional conduct were not also meant to be fully redressable through its sweep.

Our rejection of a construction of § 1983 that would accord municipalities qualified immunity for their good-faith constitutional violations is compelled by the legislative purpose in enacting the statute and by considerations of public policy. The central aim of the Civil Rights Act was to provide protection to those persons wronged by the "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *Monroe v. Pape*, 365 U.S. at 184, 81 S.C. at 482 (quoting *United States v. Classic*, 313 U.S. 299, 326, 61 S.Ct. 1031, 1043, 85 L.Ed. 1368 (1942). By creating an express federal remedy, Congress sought to "enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a state and represent it in some capacity, whether they act in accordance with their authority or misuse it." *Monroe v. Pape, supra*, 365 U.S. at 172, 81 S.Ct., at 476.

"How uniquely amiss" it would be, therefore, if the government itself—"the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct"—were

> permitted to disavow liability for the injury it has begotten. *See, Adickes v. Kress Co.*, 398 U.S. 144, 190, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970) (opinion of BRENNAN, J.). A damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees and the importance of assuring its efficacy is only accentuated when the wrongdoer is the institution that has been established to protect the very rights it has transgressed.

Id., at pp. 650 through 651 *[footnote omitted]*.

The foregoing principles have not been eroded by any subsequent decisions of the Court.

Contrary to the Petitioner's assertions, *Collins v. Harker Heights*, 112 S.Ct. 1061 (1992), neither expressly nor impliedly entitles governmental agencies to rely upon a good-faith defense to a § 1983 substantive due process challenge. Instead, in *Collins v. Harker Heights, supra*, the Court declined to grant the widow of a municipal worker fatally injured in the course of his employment a § 1983 substantive due process remedy merely because the respondent city may have failed to train or warn its employees about known hazards in the work place. This Court found that the city was at most negligent as a result of its failure to train its employees or to warn them about known risks of harm:

> We are not persuaded that the city's alleged failure to train its employees, or to warn them about known risks of harm, was an omission that can properly be characterized as arbitrary, *or* conscience-shocking, in a constitutional sense.

Id., at p. 1070 *[emphasis added]*.

The Court's use of the disjunctive "or" affirms that "arbitrary" conduct is sufficient to ground a substantive due

process challenge under § 1983 and that aggravated or "conscience-shocking" conduct is an alternative ground rather than a necessary prerequisite for establishing a violation of constitutional proportion. The Court in *Collins v. Harker Heights, supra*, relied heavily upon *Daniels v. Williams*, 474 U.S. 327 (1986), in which a § 1983 substantive due process claim of a prisoner injured by the negligence of a deputy employed by the respondent City of Richmond, Virginia, was rejected because of the claimant's failure to prove deliberate governmental misconduct:

> Historically, this guarantee of due process has been applied to *deliberate* decisions of governmental officials to deprive a person of life, liberty and property. . . . No decision of this Court before *Parratt* supported the view that negligent conduct by a state official, even though causing injury, constitutes a deprivation of the Due Process Clause. This history reflects the traditional and common-sense notion that the Due Process Clause, like its forbear in the Magna Carta *[sic]*, *See*, Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 Harv. L. Rev. 366, 368 (1911), was exercised with the powers of governmental, "*Hurtado v. California*, 110 U.S. 516, 527 (1884) (quoting *Bank of Columbia v. Okely*, 4 Wheat. 235, 244 (1819))" *the touchstone of due process is protection of the individual against arbitrary action of government, Dent v. West Virginia*, 129 U.S. 114, 123 (1889) "([*Parratt, supra*, at 549])".

Id., at p. 331 *[emphasis added]*.

Here, of course, the conduct complained of against Petitioner was arbitrary or "deliberate" within the meaning of *Daniels v. Williams, supra*. The Supreme Court of Washington found as a matter of fact and law that the

County's conduct was wilful, arbitrary, capricious and unlawful:

> Judge Kershner heard the case (the second Superior Court hearing to this point) and held that there was no factual basis for the hearing examiner's conclusions, nor was "there reference to standards, if any, that support the Examiner's decision." Order on Writ of Certiorari, Clerk's Papers of Plaintiff, at 303. The Superior Court therefore remanded the matter to the hearing examiner for detailed findings of fact and identification of the standards being applied. The hearing examiner without further hearing, filed supplemental findings of fact and conclusions in support of denial.
>
> Upon review of this action, Judge Kershner held:
>
> > [b] findings and conclusions by the Hearing Examiner *constitute wilful and unreasonable action* without consideration and in disregard of the relevant facts and circumstances. The denial of the Conditional Use Permit on these grounds is arbitrary, capricious and unlawful.
>
> Clerk's Papers of Plaintiff, at 304. He therefore ordered the immediate issuance of the permit. The County did not appeal this holding and the permit was issued.

119 Wn.2d, at p. 97 *[emphasis added]*.

The arbitrary and capricious misconduct of which Petitioner has been found liable is the converse of negligence. Doctrinally, arbitrary and capricious misconduct is an *intentional* wrong. Washington's courts have consistently defined arbitrary and capricious conduct as "Being willful and unreasoning action, without consideration and in disregard of the facts or circumstances . . .". *See, Eastlake Community Council v. Roanoke Associates*, 82 Wn.2d

475 (1973); *Bishop v. Houghton*, 69 Wn.2d 786 (1966). Here, the Petitioner was expressly found liable of ". . . wilful and unreasonable action without consideration and in disregard of the relevant facts and circumstances. The denial of the conditional use permit on these grounds is arbitrary, capricious and unlawful." *Lutheran Day Care v. Snohomish County, supra*, at p. 97.

Petitioner never appealed from this final trial court determination and the Supreme Court of Washington properly held that it was collaterally estopped from belatedly raising the issue on Respondent's appeal from an adverse trial court decision of its motions for summary judgment concerning 42 U.S.C. § 1983 liability. At page 12 of its Petition for Certiorari, Petitioner correctly notes that the guarantee of due process has been applied to "deliberate" decisions of governmental officials depriving persons of life, liberty or property. Petitioner further notes that in *Collins v. Harker Heights, supra*, the complainant did not allege any "wilful" violation of its rights. In this case, however, it has been repeatedly established as a matter of fact and law that Petitioner did in fact continually wilfully, arbitrarily and capriciously denied Respondent the conditional use permit to which Respondent was at all relevant times legally entitled. Even when ordered by a Snohomish County Superior Court Judge to justify its continued denial of Respondent's conditional use permit application, Petitioner failed or refused to comply with the express order of the Court. The magnitude of Petitioner's continued defiance of judicial authority throughout the litigation has been transparently wilful irrespective of the arbitrary and capricious conduct imposed by Petitioner upon Respondent.

The sound policy reasons for denial of a good-faith defense to municipal entities in § 1983 actions was care-

fully explained by the Court in *Owen v. City of Independence, Missouri, supra*, as follows:

> Moreover, § 1983 was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations as well. . . . The knowledge of the municipality will be liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights. Furthermore, the threat that damages might be levied against the city may encourage those in a policy making position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights. Such procedures are particularly beneficial in preventing those "systemic" injuries that result not so much from the conduct of any single individual, but from the interactive behavior of several governmental officials, each of whom may be acting in good faith.

Id., at 445 U.S. 651-652 *[citations omitted] [footnotes omitted]*.

Thus, under *Owen v. City of Independence, Missouri, supra*, and other authorities, Petitioner has no legal entitlement to engage in the wilful, arbitrary and capricious exercise of governmental power. Its conduct has been deemed wilful, unreasonable, arbitrary and capricious by every court before whom Respondent's claims have been considered. Respondent has, therefore, significantly exceeded the proof requirements of § 1983 substantive due process constitutional injury on the record before the Court.

IV.

RESPONDENT HAS A PROPERTY INTEREST AS AN OWNER AND CONDITIONAL USE PERMIT APPLICANT SUFFICIENT TO INVOKE THE SUBSTANTIVE DUE PROCESS PROTECTIONS OF 42 U.S.C. §1983

At the outset, Petitioner raises the issue of the validity of Respondent's property interest with respect to its conditional use permit application for the first time in its Petition for Writ of Certiorari. Petitioner neither briefed nor argued this issue on appeal to the Supreme Court of Washington. As a result, Petitioner is estopped from raising this issue for the first time on appeal under *Shelley v. Kraemer*, 334 U.S. 1 (1948). There, the Court declined to hear presentation of constitutional issues that had not been previously raised at lower appeallate levels. *Shelley v. Kraemer, supra*, involved this Court's invalidation of restrictive covenants governing the sale of real property which were based upon race and determined that the covenants violated Fourteenth Amendment proscriptions because state judicial action was necessary for their enforcement.

With respect to the proper criteria for establishing a substantive due process violation of 42 U.S.C. § 1983, the Supreme Court of Washington in *Lutheran Day Care v. Snohomish County, supra*, in addition to reaffirming the arbitrary and capricious standard of liability also clearly held that Respondent's conditional use permit constituted a sufficiently protectable property interest for invocation of § 1983 substantive due process protections:

> "Along with the vast majority of federal courts, we recognize that denial of a building permit, under certain circumstances, may give rise to a substantive due process claim" *(citations omitted). R/L Assoc., Inc. v. Seattle*, 113 Wn.2d 402, 412, 780 P.2d 838

(1989). We see no reason to treat denial of a conditional use permit any differently. Such denial therefore can constitute a due process violation. Such a violation is made out, however, only if the decision to deny the permit is "invidious or irrational" or "arbitrary or capricious". *R/L Assoc., Inc.*, at 412. In the present case, the trial court can be interpreted as denying appellant's due process claim based on the fact that the county did not act knowingly or recklessly in denying the permit. This is the wrong standard. The standard is arbitrary or capricious and as already discussed, Judge Kershner finding in the certiorari action that the County acted arbitrarily and capriciously in denying the permit conclusively satisfies that standard. Appellant therefore has established as a matter of law and fact that the County violated substantive due process when it denied the conditional use permit.

Id., at 125 *[footnote omitted]*.

Therefore, Petitioner's contention that Respondent lacks a sufficiently protectable property interest under the due process provisions of 42 U.S.C. § 1983 is groundless. The Court has quite clearly elucidated the proper scope of a constitutionally protected property interest for purposes of § 1983. *See, Perry v. Sindermann*, 408 U.S. 593 (1971); *Board of Regents v. Roth*, 408 U.S. 565 (1971). In both *Perry, supra*, and *Roth, supra*, the Court was presented with challenges from college professors whose employment had been terminated allegedly without procedural due process safeguards. Neither of the professors in question was "tenured" according to the formal policies of tenure followed by each institution in question. In *Board of Regents v. Roth, supra*, the Court determined that the respondent professor had no claim of entitlement to re-employment because he had only

previously managed to secure employment agreements with the Wisconsin State University—Oshkosh—for one-year terms. The facts there supported ". . . no possible claim of entitlement to re-employment." 408 U.S. at p. 578.

In *Perry v. Sindermann, supra*, however, the Court affirmed the Fifth Circuit Court of Appeals' determination with respect to the respondent's procedural due process claim that the college in question, Odessa Junior College, may have had a de facto, informal tenure policy arising from both rules and more amorphous understandings. In concluding that this de facto policy could give rise to § 1983 procedural due process protections, the Court stated:

> We have made clear in *Roth, supra*, at 571-572, that "property interests" subject to procedural due process protection are not limited by a few rigid, technical forms. Rather, "property" denotes a broad range of interests that are secured by "existing rules or understandings." *Id.*, at 577.
>
> A person's interest in a benefit is a "property" interest for due process purposes if there are such rules or mutually implicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing." *Id.*, at p. 601.

Cf. Bishop v. Wood, 426 U.S. 341 (1976) (discharge of police officer without a hearing did not violate any constitutionally protected procedural due process claim of the officer because under North Carolina state law, there was insufficient evidence that the officer was entitled to any guaranteed form of employment).

From *Board of Regents v. Roth, supra*, it is clear that identification of a constitutionally protectable property

interest requires examination of applicable state law for the source of that right:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. *It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.* It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.
>
> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Id., at p. 577 *[emphasis added]*. Thus, the question of whether a party alleging a Civil Rights Act claim has a constitutionally protected property interest is, therefore, typically resolved by reference to state law. *See for example, Mackenzie v. City of Rockledge*, 920 F.2d 1554 (11th Cir. 1991) (under Florida law, no property interest is created in favor of one possessing a building permit).

Under Washington state law, the mere application of a property owner for a building permit confers vested rights, assuming the application is consistent with then applicable zoning interests. *R/L Assoc., Inc. v. Seattle*, 113 Wn.2d 402 (1989); *see also, Eastlake Community Council v. Roanoke Associates, supra; Hull v. Hunt*, 53 Wn.2d 125 (1958); *Mercer Enterprises v. Bremerton*, 93 Wn.2d 624 (1980).

The courts of Washington have consistently held that a land owner obtains a vested right to develop land when he makes a timely and complete building application. This rule has also been expressly applied to conditional use permits. *See, Norco Construction v. King County*, 97 Wn.2d 680 (1986); *Beach v. Board of Adjustment*, 73 Wn.2d 343 (1968).

Although the Court in *Board of Regents v. Roth, supra*, was considering a procedural rather than a substantive due process claim, the steps for identifying a property interest sufficient to invoke substantive due process claims are identical. *See, Brady v. Town of Colchester*, 863 F.2d 205 (2d Cir. 1988). There, the Second Circuit Court of Appeals reversed a District Court's summary judgment of dismissal of the plaintiff's substantive due process claims because of a question of material fact as to how the property in question was used at the time plaintiff's building permit was applied for. In so holding, the Court cited *Yale Auto Parts, Inc. v. Johnson*, 758 F.2d 54 (2d Cir. 1985), for the proposition that in determining whether an applicant has a legitimate claim of entitlement to the issuance of a license or certificate for Fourteenth Amendment purposes depends upon whether the applicant would have very likely been entitled to issuance of the license or permit in question *but for* the alleged improper conduct of the defendant or defendants.

In the case presently before the Court, Respondent, Lutheran Day Care, clearly has a protectable property interest in issuance of the conditional use permit in question under Washington state law (*see, R/L Assoc., Inc. v. Seattle, supra*). From the record, moreover, Respondent's right to issuance of the subject conditional use permit was clearly acknowledged at the trial court level by virtue of a clear order by the Court to the Petitioner

directing Petitioner to issue the conditional use permit to Respondent. Petitioner never appealed from this final order.

The Snohomish County Superior Court has twice held that Respondent is entitled as a matter of law to issuance of the conditional use permit. Division One of the Court of Appeals in Washington has agreed (*see, Lutheran-Day-Care v. Snohomish Co.*, 50 Wn.App. 1058 (1988)) as has the Supreme Court of Washington. Thus, at least four different Washington state judges or panels of judges have unanimously and properly concluded that Respondent has at all relevant times had within the meaning of *Board of Regents v. Roth, supra*, a legitimate claim of entitlement to issuance of the conditional use permit that has been the subject matter of this litigation.

CONCLUSION

Having been found concurrently liable to Respondent in damages for its wilful, arbitrary and capricious conduct under RCW 64.40, *et seq.*, Petitioner cannot establish that it has suffered a redressable injury which is a necessary component of standing to litigate its constitutional claims before this Court. Even if the Court grants the relief requested by Petitioner, Petitioner's liability to Respondent will remain unchanged.

In addition, in *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91 (1992), the Supreme Court of Washington expressly found that Respondent, Lutheran Day Care, had a sufficiently protectable property interest in its right to a conditional use permit sufficient to ground its substantive due process claims under 42 U.S.C. § 1983. That Court also properly determined as a matter

of fact and law that Petitioner's deliberate, wilful, arbitrary and capricious conduct in its denial of Respondent's conditional use permit application constituted impermissible state action in clear violation of constitutionally mandated substantive due process requirements.

For the above reasons, Respondent respectfully requests that the Court deny Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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(3)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

SNOHOMISH COUNTY; THE SNOHOMISH COUNTY COUNCIL; and the SNOHOMISH COUNTY HEARING EXAMINER,
Petitioners,

v.

LUTHERAN DAY CARE, A NON-PROFIT CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

BRIEF OF THE COUNTIES OF OKANOGAN, DOUGLAS, YAKIMA, AND GRAYS HARBOR, WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-751

SNOHOMISH COUNTY; THE SNOHOMISH COUNTY COUNCIL; and the SNOHOMISH COUNTY HEARING EXAMINER,
Petitioners,

v.

LUTHERAN DAY CARE, A NON-PROFIT CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

---

BRIEF OF THE COUNTIES OF OKANOGAN, DOUGLAS, YAKIMA, AND GRAYS HARBOR, WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

INTEREST OF *AMICI CURIAE*

Amici counties [1] are political subdivisions of the state of Washington. Their discretionary authority to grant or deny conditional use permits and variances are put into jeopardy by the Washington Supreme Court's decision in *Lutheran Day Care v. Snohomish County*, 119 Wash.2d

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[1] Amici file this brief as of right pursuant to Rule 37.5 of this court.

91, 829 P.2d 746 (1992). *Amici* counties are charged by both statute and common law with making fundamental land use decisions and this decision raises the specter of federal civil rights damages every time counties use hearing examiners or local boards of adjustment to vary or condition specific uses set forth in the local zoning code. Several *Amici* operate through local boards of adjustment which are volunteer citizen boards charged with using their judgment to humanely apply zoning codes. The decision puts at risk long established land use procedures that are useful and, in some circumstances necessary to the proper management of development in order to promote the general welfare. *Amici* counties can not possibly continue to responsibly and honestly exercise their authority when the specter of federal civil rights damages hangs over their heads for any misstep.

STATEMENT

Amici Curiae counties adopt the Statement of the Case filed by Snohomish County, *et al.*, the Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

The Supreme Court of the State of Washington has infected the body of the law with a dangerous bacillus. If the germ takes hold, the effect on the legal system will certainly be congestion of the courts because nearly every denial of a conditional use permit or variance will, quite literally, become a federal case. Long settled local land use practice and law throughout the nation may be completely overhauled for no apparent reason. Local control over the most basic land use decisions will frequently be given over to the federal courts. All land use decisions which receive judicial review will have to be appealed to the highest judicial authority as a matter of common prudence to avoid federal tort damages.

Because the Washington court chose to use the federal civil rights statute, 42 U.S.C. § 1983, as the method of

infection, the disease will certainly spread rapidly throughout the bodiy politic of the nation. If pure State law had been the basis of the decision, the disease might eventually spread outside the Washington system, but surely much more slowly. The use of federal statutes does, however, give this Court the opportunity to cure the infection before it has a chance to spread. *Amici* urge this Court to do so by setting out clear limits to the role of federal civil rights law in discretionary local land use decisions.

ARGUMENT

I. THE ERROR

A. The Washington Supreme Court's Opinion Improperly Concludes That Nearly Every Erroneous Denial of a Quasi Judicial Discretionary Land Use Application Creates Liability for Local Government Under § 1983

Amici believe that the Washington Court made several legal and logical errors in this opinion. The main error, which this Court has the ability to correct, is found in the following passage at 119 Wash.2d 91 at 125:

> Along with the vast majority of federal courts, we recognized that denial of a building permit, under certain circumstances, may give rise to a substantive due process claim. (Citations omitted) *R/L Assocs., Inc. v. Seattle*, 113 Wash.2d 402, 412, 780 P.2d 838 (1989). We see no reason to treat denial of a conditional use permit any differently. Such denial therefore can constitute a due process violation. Such a violation is made out, however, only if the decision to deny the permit is "invidious or irrational" or "arbitrary or capricious". *R/L Assocs., Inc.*, at 412. In the present case, the trial court can be interpreted as denying appellant's due proces claim based on the fact that the County did not act knowingly or recklessly in denying the permit. This is the wrong standard. The standard is arbitrary or capricious and as already discussed, Judge Kershner's finding in the certiorari action that the County acted arbitrarily and

> capriciously in denying the permit conclusively satisfies that standard. Appellant therefore has established as a matter of law and fact that the County violated substantive due process when it denied the conditional use permit.
>
> Because all of the other prerequisites to a § 1983 claim have been satisfied, appellant is entitled to relief. The trial court's grant of summary judgment to the County and its denial of summary judgment to appellant must therefore be reversed.

The logical train of this conclusory passage derails at two points: First, the court ignores the discretionary nature of the conditional use permit by treating it the same as a building permit, the granting of which is a ministerial function of government. Second, the opinion relies on the magic words "arbitrary and capricious" in a trial court's opinion to automatically and without any analysis confer "strict" liability under § 1983.

1. *A Conditional Use Permit Is Not A Building Permit And Their Confusion Could Have Profound Untoward Consequences*

A nearly universal feature of modern land use law and practice is the increasing use of flexible or discretionary zoning devices such as conditional uses, special exceptions, and variances. This Court has frequently recognized the existence of such devices and their usefulness in moderating the often harsh strictures of traditional zoning codes. See, e.g., *Williamson Co. Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 188-190 (1985).

The central feature of these devices is their discretionary nature. Their employment requires some type of judicial-style hearing with the taking of evidence, creation of a record, and entry of findings and conclusions. This is certainly the case in Washington. Wash. Rev. Code §§ 36.70.020(7), 36.70.810, 36.0.970, cert. petition appendix pp. 233a-236a. See also Settle, *Washington*

Land Use and Environmental Law and Practice, § 2.10 at 52, et seq., and § 2.12, at 64, et seq. Butterworth Legal Publishers (Seattle, 1983).

Petitioner Snohomish County has argued compellingly in its petition that the discretionary nature in the granting of a conditional use permit removes such a permit from the set of property rights protected by the fourteenth amendment and § 1983. We will not labor the Court with a reiteration of that argument.

It is our contention, however, that the discretionary nature and the procedural and judicial oversight inherent in these discretionary devices does, at the very least, remove this from the family of a *substantive* due process rights. Put another way, if the granting of a conditional use permit is discretionary and, as the name applies, "conditional", the applicant does not have a substantive property right in it (*Bateson v. Geisse*, 857 F.2d 1300, 1305 (9th Cir. 1988)), and at most, has a legitimate expectation for procedural regularity in determining the application.

The most that can be said of the decision by the hearing examiner in the case at bench is that it was, perhaps, wrong. A Court has already determined that there is no evidence whatsoever that the process was knowingly or recklessly improper, 119 Wash.2d at 125, *supra*; and there is no hint, in this case, of any malicious intent. In such a circumstance we have the redress of judicial review to correct the improper exercise of discretion. That is the purpose of writs of review or certiorari under Washington law. Wash. Rev. Code §§ 7.16.030, 040, cert. pet. app. at page 231a. We can find no case anywhere where a federal civil rights damage remedy was added on top of the normal local judicial remediation of a quasi-judicial action.

If every procedural irregularity that results in a legally incorrect conclusion gives rise to federal damages (regardless of its later correction by the judiciary) there is

clearly a potential for the federal courts to be involved in every discretionary land use decision made throughout the country including the most minor variance of any zoning code anywhere.

2. *"Arbitrary And Capricious" Means Many Different Things In Washington And Therefore Its Use As A Criterion To Impose Federal Damages Is Arbitrary And Capricious*

This Court has frequently cautioned againse the use of totemic language in place of legal reasoning. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 284 (1977); *Public Service Commission of Utah v. U.S.*, 356 U.S. 421, 434 (1958) (Frankfurter, J., dissenting); *Sochor v. Florida*, —— U.S. ——, 112 S.Ct. 2114, 2123 (1992) (O'Connor, J., concurring). Yet the Washington State Supreme Court has done just that. In the above quoted section that court states that as long as the trial court spoke the magic words "arbitrary and capricious" and no appeal was taken, damages are due. The state supreme court did not inquire as to the factual background of the superior court's decision or even the reasons why it uttered the incantation.

This lapse in the Washington Supreme Court's judicial analysis might be understandable if the term "arbitrary and capricious" had a consistent, well known, and absolute interpretation throughout the state's law. Because the term does not have such uniform interpretation, and because it is *the* basic standard for review of discretionary decisions, Wash. Rev. Code § 7.16.120, cert. pet. app. at 233a; *Bay Industry v. Jefferson Co.*, 33 Wash. App. 239, 241, 653 P.2d 1355 (1982), the Washington decision unambiguously creates strict liability under *federal* statute for conditional land use permits and all other "discretionary zoning" and variance procedures.

Washington, like most jurisdictions, has a basic definition for the "arbitrary and capricious" standard. It runs as follows:

> Arbitrary and capricious action of administrative bodies means wilful and unreasoning action, without consideration and in disregard of facts and circumstances. Where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached.

Lillions v. Gibbs, 47 Wash.2d 629, 633, 289 P.2d 203 (1955).

Unfortunately, Washington courts—like most courts—have gone through activist phases, where they have felt hamstrung by this very narrow scope of review. Thus, although this basic definition is frequently repeated, it has probably just as frequently been relaxed when the reviewing court disagrees with the quasi-judicial decision below. There is, for example, a line of cases where decisions have been reversed as arbitrary and capricious because of an incomplete record, or the reviewing court's sense that the administrative body decided on facts and personal experience that were not in the record. *State ex rel. Tidewater-Shaver v. Kuykendall*, 42 Wash.2d 855, 891, 259 P.2d 838 (1953); and *see State ex rel. Country Club v. Department of Public Service*, 198 Wash. 37, 47-48, 86 P.2d 1104 (1939). If one takes these cases literally, an action could be found arbitrary and capricious because of a lazy scrivener or a faulty tape machine. This should not be the cause of federal damages.

As well, although an error of law is an alternative standard of review in a writ of certiorari or review, our Courts frequently confuse the standards and have stated that an error of law is *per se* arbitrary and capricious:

> For the School Board to rely upon the so called "two options" doctrine, however, [see quotation above] it is required that each opinion be based on sound reasoning and founded upon fact, for if only one opinion is in accord with existing law and supported by the

> record, a contrary decision by the public agency involved constitutes willful and unreasoning action.

Butler v. Federal Way School District, 17 Wash. App. 288, 296, 562 P.2d 271 (1977); see also *Helland v. King County Civil Service Commission*, 84 Wash.2d 858, 863, 529 P.2d 1058 (1975).

In fact, the pretense of uniform judicial deference to administrative boards under the *Lillions* definition of "arbitrary and capricious" conduct disappeared from the landscape as early as 1972 when our supreme court decided a spot zoning case. It pointed out that because spot zoning benefits only a few and may be a disadvantage to some or many, it is therefore not for the general welfare. It then stated that "[b]ecause the action was not for the '*general* welfare', it was in turn arbitrary and capricious." (emphasis in the original). *Anderson v. Island County*, 81 Wash.2d 312, 325, 501 P.2d 594 (1972).

As these cases demonstrate, the arbitrary and capricious standard is not consistently applied and can mean as little as your record was inadequate, you made an error of law, or the reviewing court believed your action was contrary to the general welfare. *Amici* believe that federal damages should not be imposed under such circumstances.

II. THE CONSEQUENCES

A. Because § 1983 Federal Damages Are Now Available in Nearly Any Unappealed Erroneous Land Use Decision, Federal Courts Can Expect Hundreds of Such Cases, and Municipalities and Applicants Will Be Motivated to Take Every Case to the Appellate Limit

As we have stated, the arbitrary and capricious standard is the basic standard of review for discretionary land use decisions. (Section A2, *supra*). Therefore, most adverse judicial determinations will have the words "arbitrary and capricious" attached. If the Washington Supreme Court is upheld in this decision, all such initial

judicial reviews, if not appealed, will be determinative of civil rights damages under § 1983.

The main consequence of this unavoidable conclusion is that successful review petitioners will begin demanding those damages. Because the state issues will have all been disposed of in this opinion, the successful petitioner need only wait until the state appeal period has run before he jumps into state or federal court to ask for his damages. It appears inconceivable to *Amici* that they will not do this. Liability will have been determined already; the amount of damages will be the only question. Most litigants do not turn down free money.

Initially, we can expect this influx in the Washington federal courts. If Certiorari is denied in this case, we can probably expect that litigants all over the country will view that denial as permission to apply to their own federal courts for similar relief. We believe this consequence is unavoidable.

Local governments, faced with this possibility, will have two options: Either appeal every land use decision to the limit or grant every application for a conditional use permit or variance.

As things stood before this opinion, local officials were able to carefully weigh the consequences to the community of acceding to the judicial determination, against the cost of appealing that determination. They will no longer be able to make that careful calculation. Every variance, special use, conditional use or other discretionary device will have to be appealed to avoid federal damages if a municipal denial is reversed. If the lower court's adverse decision is upheld by the appeal, the damages will still accrue, but wherever there is substantial reason to believe that the trial court made an error, ordinary prudence would dictate that appeal must be pursued.

The other method by which local government might choose to deal with this decision is to remove the dis-

cretionary nature of conditional use permits and variances. Government can not be sued for denying conditional use permits if it always grants them. The problem with this approach is that the Legislature gave local land use boards this tool for dealing with land use issues. It should be up to the Legislature to take them away, not the state supreme court by implication.

The dilemmas are more acute for small communities. Unlike Snohomish County, *Amicus* Okanogan County, for example, is large but sparsely populated and relies on an all-volunteer board of adjustment made up of local shopkeepers, ranchers, and orchardists. They are not professionaly trained hearing examiners, attorneys, or planners. They do, however, embody the sense of the community on what types of uses are appropriate and inappropriate in a certain neighborhood within a zone. The best that law should require of them is that they exercise their authority honestly with the good of the community in mind. To make them individually, or the county, liable in civil rights damages for procedural imperfections is grossly unfair and socially irresponsible.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari filed by Snohomish County should be granted.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Respondent asserts that even if the Washington Supreme Court erred in holding petitioners[1] liable under 42 U.S.C. § 1983, petitioners suffered no "redressable injury" because the state court found petitioners "concurrently" liable

[1] Pursuant to Rule 29.1 of the Rules of this Court, petitioners state that the County of Snohomish is a municipality and, as such, has no parent companies or subsidiaries.

under a state statute. Brief in Opposition at 1. That assertion is wrong: the state court's rulings on federal and state questions were not alternative ways of reaching the same result; they were separate and independent rulings, and they have distinct consequences.

The Washington Supreme Court held petitioners liable under Wash. Rev. Code § 64.40.020 (*see* Pet. App. 4a-23a) and remanded for determination of damages and attorneys' fees under that statute. It then went on (Pet. App. 23a-33a) to hold at some length that petitioner was also liable under 42 U.S.C. § 1983 and remanded for determination of damages under that statute as well, together with attorneys' fees under 42 U.S.C. § 1988. It plainly did not think that the state-law ruling obviated the federal law questions, and it did not suggest that the damages and attorney's fee awards would be the same under both sets of statutes. To the contrary, the extent to which any damage awards would overlap is at best unclear, and any attorney's fee awards would plainly cover distinct legal services.

Petitioners thus have good pocketbook reasons to challenge the state court's serious misreading of federal law.

Section 1983 provides a federal remedy only for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." The measure of damages recoverable under § 1983 is a matter of federal law, generally derived from common law principles of tort. *Memphis Community School Dist. v. Stachura*, 447 U.S. 299, 306 (1986). The measure of damages for violation of the state statute is governed by state statutory law. The pertinent Washington statute defines "damages" as follows:

> "Damages" means reasonable expenses and losses, other than speculative losses or profits, incurred between the time the cause of action arises and the time a holder of an interest in

> real property is granted relief as provided in RCW 64.40.020. Damages must be caused by an act, necessarily incurred, and actually suffered, realized, or extended, but are not based upon diminution in value of or damage to real property, or litigation expenses.

Wash. Rev. Code. § 64.40.010(4) (1989) (Pet. App. 239-a). This statute has never been interpreted by a court of record, so the meanings under state law of the numerous limitations it imposes are unclear: "reasonable expenses and losses"; "other than speculative losses"; "necessarily incurred" between two specified points in time; "caused by an act [rather than an omission]"; and "not based upon diminution in value of or damage to real property." However a Washington court may interpret these statutory provisions, federal damages for a violation of § 1983 would not be subject to these statutorily-prescribed limitations.

The point about damages is closely related to the Washington Supreme Court's central error in this case. The state statute, as conclusively interpreted by that court, awards damages for land-use permitting actions that are arbitrary and capricious in the administrative law sense: the state court squarely held (Pet. App. 19a-23a) that an earlier determination that petitioners' denial of a conditional use permit should be reversed as arbitrary and capricious automatically established liability to respondent for damages. If that is the substantive law in Washington, a narrow delimitation of damage awards may well be appropriate. But the state court then held that the same earlier determination automatically established liability under Section 1983 as well, exposing petitioners to damage liability measured as if there had been a genuine deprivation of

federal constitutional rights. Petitioners have good reason to ask this Court to reverse that error.

In addition, the amount awarded as attorneys' fees against petitioners plainly does depend on the validity of respondent's federal law claim. The prevailing party in a Section 1983 case is entitled, under 42 U.S.C. § 1988, to an award of attorneys' fees for efforts expended in successfully pursuing that federal claim. *E.g.*, *Hensley v. Eckerhart*, 461 U.S. 424 (1983). If respondent was not entitled to prevail on that claim, it is not entitled to attorneys' fees for those efforts, because Washington law does not provide for an award of attorneys' fees for the unsuccessful pursuit of a federal claim. To the contrary, Washington law would clearly require segregation of, and would clearly deny compensation for, lawyer hours spent unsuccessfully pursuing a federal claim, even where a state-law claim is successful. *See Gagliardi v. Denny's Restaurants, Inc.*, 117 Wash. 2d 426, 450, 815 P.2d. 1362, 1375 (1991):

> Segregation is required where attorney's fees are authorized for only some of the claims. *See Travis v. Washington Horsebreeder's Association, Inc.*, 111 Wn.2d 396, 410-11, 759 P.2d 418 (1988) (although claims overlap, the trial court must separate the time spent on the issues for which attorney fees are authorized from time spent on other issues); *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 66, 738 P.2d 665 (1987) (attorney fees should be awarded only for those services related to the cause of action which allows for fees); *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 744, 733 P.2d 208 (1987) (attorney fees should only represent reasonable amount of time and effort expended on claim for which fees are authorized); *Fisher*

Properties, Inc. v. Arden-Mayfair, Inc., 106 Wn.2d 826, 849-50, 726 P.2d 8 (1986) (when a party recovers both on claims for which fees are authorized and claims for which there is no authorization, it is proper to limit the award to legal services provided on former claims).

In sum, the Washington Supreme Court's instruction that attorneys' fees be awarded on remand for the effort expended in pursuing the Section 1983 claim gives rise to an additional "redressable injury" that compels petitioners to challenge that court's erroneous constitutional ruling.

CONCLUSION

For the reasons stated in our petition and in this brief, the petition should be granted.

Respectfully submitted,

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